(25,492)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 662.

B. M. AIKINS, PLAINTIFF IN ERROR,

vs.

V. S. KINGSBURY, AS REGISTER OF THE STATE LAND OFFICE.

N ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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ED & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1917.

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1&2 S. F. 7104.

In the District Court of Appeal of the State of California in and for the First Appellate District.

B. M. AIKINS, Plaintiff and Respondent.

vs.

W. S. KINGSBURY, as Register of the State Land Office, Defendant and Appellant.

TRANSCRIPT ON APPEAL

From the Judgment of the Superior Court of the State of California in and for the City and County of San Francisco and from the Order of said Court Denying Defendant's Motion for a New Trial.

Hon. J. M. Seawell, Judge.

U. S. Webb, Attorney General, and Malcolm C. Glenn, Deputy Attorney General, Attorneys for Appellant.

Endorsed: Filed this 14th day of May, A. D. 1913. Percy J. Hayselden, Clerk.

3 TRANSCRIPT ON APPEAL.

In the Superior Court of the State of California in and for the City and County of San Francisco.

B. M. AIKINS, Plaintiff,

vs.

W. S. KINGSBURY, as Register of the State Land Office, Defendant.

Petition.

Complaint.

To the Honorable the Superior Court of the State of California in and for the City and County of San Francisco:

The affidavit and petition of B. M. Aikins, of the City and County of San Francisco, State of California, above named as plaintiff herein, respectfully shows:

I.

That W. S. Kingsbury, above named as defendant herein, is now, and for more than one year last past has been, the Register

of the State Land Office, duly elected, qualified and acting in that capacity.

4 II.

That on and prior to the 3rd day of June, 1869, the State of California was the owner of that certain tract of land situate in Kern County, State of California, and consisting of three hundred and twenty (320) acres of State School Land, described as follows: In location number 776 Surveyed Lands, Visalia Land District, North one-half (½) of Section Thirty-six (36), Township number Twenty-eight (28) South, Range number Twenty-one (21) East, Mount Diablo Meridian.

III.

That said tract of land was at said time a part of the unsold portion of the 16th and 36th sections granted to the said State of California for school purposes, and was subject to the provisions of an Act entitled "An Act to Provide for the Management and Sale of the Lands belonging to the State," approved March 28, 1868.

IV.

That on said 3rd day of June, 1869, and under and by virtue of the provisions of the Act above referred to, and while said State of California was so the owner of said tract of land as aforesaid,
5 it did sell to one Charles A. B. Brackett, and said Charles A. B. Brackett did buy of it the said tract of land, at and for the price of One dollar and twenty-five cents ($1.25) per acre, that is to say, at and for the aggregate price of Four hundred (400) Dollars, payable in the manner and at the times prescribed in said Act.

V.

That said Charles A. B. Brackett made payment to the State of California of twenty (20) per cent of the purchase price of said tract of land, and interest on the balance to the 1st day of January, 1870.

VI.

That under and pursuant to said Act, and in evidence of the said sale, the Register of the State Land Office then in office, did execute, issue and deliver to the said Charles A. B. Brackett a certificate of purchase for said tract of land, which said certificate of purchase is entitled as follows, to wit: "Certificate of Purchase. Grant of 16th and 36th Sections—Surveyed Lands. Price per acre, One 25/100 Dollars. State Land Office of the State of California," and which said certificate contains the following recital, to wit:

"It appearing from the Certificate of the County Treasurer,

6 bearing date June 3d, A. D. 1869, that Charles A. B. Brackett has paid to the State of California the sum of one hundred and two 20/100 (102.20/100) Dollars, being twenty per cent of the purchase money and first interest on the balance, in advance to Jan'y 1st, 1870, for 320 acres of State School Land, described as follows, in location No. 776 Surveyed Lands Visalia Land District N. ½ of Section 36 in Township No. 28 South, Range No. 21 East, Mount Diablo Meridian."

and certifies the following facts, in the words and figures as follows, to wit:

"Now, Therefore, be it known, That the said Charles A. B. Brackett having made payment of said twenty per cent and first year's interest, for the above described tract of land, under the provisions of an Act entitled "An Act to provide for the sale of certain Lands belonging to the State," approved March 28th, 1868, is the Purchaser of the same; and after having in all other respects complied with the provisions of said Act, and on surrendering this Certificate to the State of California, the said Charles A. B. Brackett shall be entitled to receive a Patent for the same.

Balance of purchase money due 320.00/100 Dollars.

7 Interest to be computed from April 20th, 1869.

Act of March 28th, 1868. Interest—Ten Per Cent per Annum in Advance."

VII.

That said certificate of purchase so issued as aforesaid to the said Charles A. B. Brackett is now, and ever since the issuance thereof has continuously been, in force and effect, and has never been cancelled, annulled, foreclosed, vacated or set aside, and that no contest or protest has ever been made or filed against the same.

VIII.

That on or before the 26th day of October, 1911, your petitioner became the owner by mesne conveyance from said Charles A. B. Brackett, of a portion of said tract of land, and that final payment has been made for said tract of land in full, both of principal and of interest, and that the said certificate of purchase has been surrendered by said petitioner to said defendant, and that upon such surrender your petitioner paid defendant the sum of Seven (7) Dollars, as and for the fee for a patent to said lands, and then and there demanded a patent for said tract of land, but that defendant refused,

8 and ever since has refused, and still refuses to prepare a patent for said tract of land, and to take any other steps requisite for the issuance of such patent.

IX.

That plaintiff has no plain, speedy or adequate remedy in the

premises by the ordinary course of law, and is accordingly entitled to the aid of this court by its writ of mandate.

Wherefore plaintiff prays:

(1) That this court do issue its writ of mandate commanding defendant, in his official capacity as the Register of the State Land Office, to show cause to the court, at a time to be fixed by the court for that purpose, why he should not be compelled to prepare a patent for the said tract of land, in the name of said Charles A. B. Brackett, and to send the same to the Governor of the State of California, together with a certificate that the laws in relation thereto have been complied with, that payment in full has been made, and that said Charles A. B. Brackett is entitled to it; and that if defendant shall fail to show cause, that he be compelled by the mandate of this court to prepare a patent for said tract of land, in the name of Charles A. B. Brackett, and to send the same to the Governor, together with a certificate that the laws in relation thereto have been complied with, that payment in full has been made, and that
9 the said Charles A. B. Brackett is entitled to it.

(2) Such further and other relief as may to the court seem proper.

(3) A judgment against defendant for the costs of suit herein.

GAVIN McNAB,
LUTHER ELKINS,
NAT SCHMULOWITZ,
Attorneys for Plaintiff and Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

B. M. Aikins, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Affidavit and Petition for Writ of Mandate and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, he believes it to be true.

B. M. AIKINS.

Subscribed and sworn to before me, this 29th day of February, A. D. 1912.

[SEAL.] ELLA L. SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

[Duly served and filed.]

10 [Title of Court and Cause.]

Demurrer to Complaint.

Now comes the defendant above named and by consent of the parties hereto and by leave of Court first had and obtained files this

his amended demurrer herein and demurs to the petition or complaint of plaintiff and assigns the following grounds of demurrer:

I.

That said petition or complaint does not state facts sufficient to constitute a cause of action, or to entitle petitioner to a writ of mandate.

II.

That said petition or complaint does not state facts sufficient to authorize the granting of the relief prayed for or any relief.

III.

That plaintiff's alleged cause of action is barred by the provisions of subdivision I of section 338 of the Code of Civil Procedure of the State of California.

IV.

That plaintiff's alleged cause of action is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

11

V.

That the said petition or complaint is uncertain in this:

It is alleged in paragraph eight thereof that the plaintiff became the owner of a portion of the tract of land described in the certificate of purchase referred to in the complaint but it cannot be told from said complaint whether or not payment has been made in full for the tract of land described in the certificate of purchase or for only that portion of the tract of land now claimed by the said plaintiff herein.

Wherefore defendant prays that plaintiff take nothing by said proceeding that the same be dismissed and that he recover his costs herein.

U. S. WEBB,
Attorney General, and
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for Respondent.

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Certificate of Counsel.

I, Malcolm C. Glenn, one of the attorneys for defendant in the above entitled action do hereby certify that in my opinion the amended demurrer of the defendant to the complaint of plaintiff herein is not filed for delay and is well taken in point of law.

Dated July 23, 1912.

MALCOLM C. GLENN,
Deputy Attorney General, one of the Attorneys for the Above-named Defendant.

[Duly served and filed.]

13 [Title of Court and Cause.]

Order Overruling Demurrer.

In this action defendant's amended demurrer to petition on file herein having been heretofore submitted to the court for decision and now the Court being fully advised herein it is ordered that said demurrer be and the same is hereby overruled with leave to defendant to answer complaint within ten (10) days.

[Entered September 11, 1912, in book 65, page 341, civil minutes of said court.]

14 [Title of Court and Cause.]

Amended Answer.

Comes now the above named defendant and without waiving his amended demurrer this day served and filed herein but expressly insisting upon the same and by consent of the parties hereto and by leave of Court first had and obtained, files this his amended answer herein and admits, denies and avers as follows:

I.

Answering paragraph VII of said petition, this defendant denies that the certificate of purchase referred to is now and ever since the issuance thereof, has continuously been in force and effect, or in force or effect. This defendant denies that said certificate has never been cancelled, annulled, foreclosed, vacated and set aside, or cancelled or annulled or foreclosed or vacated or set aside.

II.

Answering paragraph VIII of said petition, this defendant alleges that he has no information or belief upon the subject sufficient to enable him to answer the allegations thereof, and upon that ground denies that upon October 26th, 1911, or at any other time, petitioner became the owner by mesne conveyances, or the owner at all,
15 from Charles A. B. Brackett, or from any other person, of the whole or any portion of the tract of land described in said petition.

III.

That defendant denies that petitioner has no plain, speedy, and adequate, or plain, or speedy or adequate remedy, in the ordinary course of law. This defendant denies that petitioner is entitled to the aid of this court by its writ of mandate.

For a further, separate and second defense herein, defendant avers:

I.

That on June 3rd, 1869, a certificate of purchase was issued to Charles A. B. Brackett for the land described in said petition as stated in paragraph VI of said petition.

II.

That neither said Brackett, nor any one on his behalf, ever made any payments of any sums whatever upon account of said purchase, until October 30, 1911, other than as follows: June 3, 1869, payment on account of principal $80.00 and on account of interest to January 1st, 1870, $22.20; April 28, 1871, payment on account of interest $32.00; July 9, 1872, payment on account of interest $64.00.

That on May 1st, 1874, the then Register of the State Land
16 Office of the State of California prepared and forwarded to the District Attorney of the County of Kern, a statement embracing all lands in said county upon which payment had not been made according to law. That said statement showed the name of the purchaser, the number and date of the survey or location, and of the certificate of purchase; the amount paid, the amount unpaid, and the amount then due. That said statement further showed that the sum of three hundred and twenty (320) dollars remained unpaid as principal, and the sum of sixty-four (64) dollars due as interest thereon upon January 1st, 1874, from said Brackett.

III.

That upon receipt of said delinquent list, to wit, said statement, said District Attorney did on June 10th, 1874, give notice by publication, in accordance with section 3547 of the Political Code, that if said amount of sixty-four (64) dollars due and delinquent as aforesaid was not paid within fifty (50) days after said date, action would be commenced by him as such District Attorney to foreclose the interest of said Brackett in the lands described in said certificate. Said description designated said lands as being held under certificate
of purchase No. 2165, state school lands, location 776 Visalia
17 Land District, and embracing the north half of section 36, township 28 south, range 21 east, Mt. Diablo Base and Meridian.

IV.

That said notice was published for four consecutive weeks immediately following said June 10th, 1874, in a newspaper of general circulation, printed and published at Bakersfield, in said Kern County, and circulated therein, which said newspaper was known and designated as the "Southern Californian." That the first publication of said notice was made on June 11th, 1874, and that the last of said publication was on July 9, 1874. That said published notice was dated June 10th, 1874, and stated that if the amount due

and delinquent upon said certificate No. 2165, were not paid within fifty days from the date thereof, suit would be commenced at the expiration of said fifty days to foreclose the interest of the purchaser in the lands described therein, and to cancel and annul the certificate of purchase to the same. That the description of the land was the same as that last above given. That said amount of $64.00 so due and delinquent, as aforesaid, for interest, was not paid during said period of fifty days, or at all.

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V.

That on August 13th, 1874, said District Attorney commenced an action in the District Court of the Sixteenth Judicial District in and for the County of Kern, wherein the People of the State of California were plaintiffs, and A. B. Brackett and John Doe unknown owner and holder of certificate of purchase No. 2165 of the following described school lands: Location No. 776 the north ½ of Section 36, Township 28 South, Range 21 East, Mount Diablo Base and Meridian, containing three hundred and twenty acres, were defendants. That thereafter by the judgment of said court duly made and given on the 30th day of November, 1874, it was ordered, adjudged and decreed that all interest of said defendants in and to said certificate of purchase, and all right, title and interest in and to the lands therein described, be foreclosed and forever cancelled and henceforth rendered null and void and of no force, validity or effect whatever; that all persons claiming under said defendants, A. B. Brackett and John Doe subsequent to the execution of said certificate of purchase either as purchasers, encumbrancers or otherwise, be forever barred and foreclosed of all right, claim or equity of redemption in and to said certificate of purchase of the above described land, and every part thereof.

19

VI.

That on July 29th, 1886, one Michael Phillips made application to the then Surveyor General of the State Land Office, for all of said Section 36, and made payment to the State of California of twenty per cent of the purchase price thereof, together with interest to January 1, 1887, whereupon said Register issued to said Phillips a certificate of purchase, numbered 10,300, covering said entire section.

VII.

That on August 28th, 1911, the then holders of said certificate No. 10,300 paid to the State of California, the full amount then due to said state on account of said purchase by said Phillips, and thereupon surrendered to respondent said certificate of purchase. That on August 30th, 1911, said then holders paid to this defendant the sum of nine (9) dollars as final fees for the issuance of a patent to the whole of said section 36, and then and there demanded that this defendant prepare a patent in favor of said

Phillips for the whole of said section, and present the same to the Governor of the State of California, together with a certificate that the law in relation to the sale of said section had been complied with by said Phillips, and those claiming under him.

20 VIII.

That thereupon this defendant caused to be issued to the claimants under said Phillips' certificate, a patent in the name of said Phillips, for the south half of said section 36.

IX.

That no contest of the rights of said Phillips, or of anyone claiming under him, under Sections 3414 or 3415 or 3499 of the Political Code, or under any other section of said code, was filed with this defendant by Charles A. B. Brackett, or any person claiming under him, or by any other person, at any time prior to January 1st, 1911, or at any other time, or at all.

X.

That the claimants under said Phillips' certificate assert and claim that the Charles A. B. Brackett referred to in said petition and the A. B. Brackett referred to in the foregoing judgment are the same person.

XI.

That defendant has refused to certify to the Governor of the State of California that a patent should issue for the north half of said section to the claimants under said Phillips' certificate,
21 or to the claimants under said Brackett's certificate, by reason of the antagonistic demands of the claimants under the certificates aforesaid.

For a further, separate and third defense herein defendant avers:

I.

Defendant reavers all the matters set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the second defense hereinbefore set forth and by reference to said paragraphs makes the said paragraphs and each of the same and all the matters set forth therein a part of this defense.

II.

That by reason of the facts so set forth in paragraphs 1 to 10, inclusive, of said second separate defense herein and which are hereby made a part of this third separate defense defendant alleges that the said plaintiff's alleged cause of action is barred by the laches of said plaintiff and his predecessors in interest.

22 For a further separate and fourth defense herein defendant avers:

I.

Defendant reavers all the matters set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the second defense hereinbefore set forth and by reference to said paragraphs makes the said paragraphs and each of the same and all the matters set forth therein a part of this defense.

II.

That the plaintiff's alleged cause of action by reason of the said matters set forth in said paragraphs, 1 to 10 inclusive, of the said second defense and referred to in paragraph one of this defense is barred by the provisions of Subdivision I of Section 338 of the Code of Civil Procedure of the State of California.

For a further separate and fifth defense herein defendant avers:

I.

Defendant reavers all the matters set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the second defense hereinbefore set forth and by reference to said paragraphs makes the said paragraphs and each of the same and all the matters set forth therein a part of this defense.

23 II.

That the plaintiff's alleged cause of action by reason of the said matters set forth in said paragraphs 1 to 10, inclusive, of the said second defense and referred to in paragraph one of this defense is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

For a further separate and sixth defense herein defendant avers:

I.

That on July 29th, 1886, one Michael Phillips made application to the then surveyor general of the State Land Office for all of section 36 in said complaint described and made payment to the State of California of 20 per cent of the purchase price thereof together with interest to January 1, 1887. Whereupon said Register issued to said Phillips certificate of purchase No. 10,300 covering said section of land. That on August 28th, 1911, the then holder of said certificate No. 10,300 paid to the State of California the full amount then due to said State on account of said purchase by said Phillips and thereupon surrendered to defendant herein said certificate of purchase. That on August 30, 1911, said

24 then holders of said certificate paid to this defendant the sum

of $9.00 as final fees for the issuance of a patent to the whole of said section 36 and then and there demanded that this defendant prepare a patent in favor of said Phillips for the whole of said section and present the same to the Governor of the State of California together with a certificate that the law in relation to the sale of said section had been complied with by said Phillips and those claiming under him. That thereupon this defendant caused to be issued to the claimants under said Phillips' certificate a patent in the name of said Phillips for the south half of said Section 36.

That no contest of the certificate of purchase so issued to said Phillips on July 29th, 1886, as above set forth, or of the rights of said Phillips, or of any one claiming under him, under sections 3414 or 3415 or 3499 of the Political Code, or under any other section of said code, or at all was made or filed by Charles A. B. Brackett or any person claiming under him, or by any other person, at any time prior to January 1, 1911, or at any other time, or at all, and said defendant avers that the said certificate of purchase was issued at a period more than five years prior to January 1, 1911, to wit: On the 29th day of July, 1886. Defend-
25 ant therefore alleges that plaintiff's alleged cause of action is now barred by the provisions of section 3499 of the Political Code of the State of California.

Wherefore defendant prays that plaintiff take nothing by this proceeding, that the same be dismissed and that he recover his costs of suit herein.

U. S. WEBB,
Attorney General, and
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for Respondent.

STATE OF CALIFORNIA,
County of Sacramento, ss:

W. S. Kingsbury, being first duly sworn, deposes and says: That he is the defendant in the above and foregoing action; that he has read the above and foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge excepting as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true.

W. S. KINGSBURY.

26 Subscribed and sworn to before me this 23d day of July, 1912.

[SEAL.] MALCOLM C. GLENN,
Notary Public in and for the County of Sacramento, State of California.

[Duly served and filed.]

[Title of Court and Cause.]

Findings.

This cause came on regularly for trial on the petition of the plaintiff and the amended answer of the defendant thereto, on the 18th day of October, 1912, before the Court, without a jury, a jury trial having been duly waived by the parties, Luther Elkins, Esq., appearing as attorney for plaintiff, and Malcolm C. Glenn, Esq., Deputy Attorney General, appearing as attorney for defendant, with whom were George C. Sargent, Esq., and Jesse Olney, Esq., amici curiæ; and thereupon the parties introduced their evidence, both oral and documentary, and counsel for the respective parties made various admissions on behalf of their respective clients and entered into various stipulations, likewise in their behalf; and the case was thereupon submitted on briefs; and thereafter, and on the 27th day of November, 1912, the briefs having been duly filed
27 and served, and the parties hereto having been duly notified, through their respective attorneys, to be present in Court, the Court called to the attention of counsel the fact that the petition herein in paragraph VIII thereof alleges: "that final payment has been made for said tract of land in full," without alleging by whom; and it appearing by the admissions of the parties in open court that the defendant had not been misled by failure to allege the making of said payment by plaintiff, and that no question had been raised at the trial upon that point, and that it was conceded by counsel for the respective parties, both at that time and at the trial, that payment had been made by plaintiff as well as on behalf of the successors in interest of one Michael Phillips, referred to in the amended answer of the defendant, and no objection being made thereto, the Court did, by an order then and there duly given and made, grant leave to plaintiff to amend his said petition in regard to said allegation of payment, in such manner that the same should read as follows, to wit: "that final payment has been made for said tract of land in full, both of principal and of interest, by the plaintiff herein," and that the said petition should be deemed to have been so amended without the necessity of filing or serv-
28 ing any amendment thereof;

Whereupon the Court proceeded to find from the evidence introduced at the trial and from the admissions and stipulations of the parties, the facts as follows, to wit:

Findings of Fact.

I.

That W. S. Kingsbury, above named as defendant herein, is now, and for more than one year last past has been, the Register of the State Land Office, duly elected, qualified and acting in that capacity.

II.

That on and prior to the 3d day of June, 1869, the State of California was the owner of that certain tract of land situate in Kern County, State of California, and consisting of three hundred and twenty (320) acres of State School Land, described as follows:

In location number 776 Surveyed Lands, Visalia Land District, North one-half (½) of Section Thirty-six (36), Township number Twenty-eight (28) South, Range number Twenty-one (21) East, Mount Diablo Meridian.

29

III.

That said tract of land was at said time a part of the unsold portion of the 16th and 36th sections granted to the said State of California for school purposes, and was subject to the provisions of an Act entitled "An Act to Provide for the Management and Sale of the Lands belonging to the State," approved March 28, 1868.

IV.

That on said 3d day of June, 1869, and under and by virtue of the provisions of the Act above referred to, and while said State of California was so the owner of said tract of land as aforesaid, it did sell to one Charles A. B. Brackett, and said Charles A. B. Brackett did buy of it, the said tract of land, at and for the price of One dollar and twenty-five cents ($1.25) per acre, that is to say, at and for the aggregate price of Four hundred (400) Dollars, payable in the manner and at the times prescribed in said Act.

V.

That said Charles A. B. Brackett made payment to the State of California of twenty (20) per cent of the purchase price of said tract of land, and interest on the balance to the 1st day of January, 1870.

30

VI.

That under and pursuant to said Act, and in evidence of the said sale, the Register of the State Land Office then in office, did execute, issue and deliver to the said Charles A. B. Brackett a certificate of purchase for said tract of land, which said certificate of purchase is entitled as follows, to wit: "Certificate of Purchase. Grant of 16th and 36th sections—Surveyed Lands. Price per acre, One 25/100 Dollars. State Land Office of the State of California," and which said certificate contains the following recital, to wit:

"It appearing from the Certificate of the County Treasurer, bearing date June 3d, A. D. 1869, that Charles A. B. Brackett has paid to the State of California the sum of one hundred and two 20/100 (102.20/100) Dollars, being twenty per cent of the pur-

chase money and first interest on the balance, in advance to Jan'y 1st, 1870, for 320 acres of State School Land, described as follows, in location No. 776 Surveyed Lands Visalia Land District N. ½ of Section 36 in Township No. 28 South, Range No. 21 East, Mount Diablo Meridian."

and certifies the following facts, in the words and figures as follows, to wit:

"Now, therefore, be it known, that the said Charles A.
31 B. Brackett having made payment of said twenty per cent and first year's interest, for the above described Tract of Land, under the provisions of an Act entitled "An Act to provide for the sale of certain Lands belonging to the State," approved March 28th, 1868, is the Purchaser of the same; and after having in all other respects complied with the provisions of said Act, and on surrendering this Certificate to the State of California, the said Charles A. B. Brackett shall be entitled to receive a Patent for the same.

Balance of purchase money due 320.00/100 Dollars.

Interest to be computed from April 20th, 1869.

Act of March 28th, 1868. Interest—Ten Per Cent per Annum in Advance."

VII.

That said certificate of purchase so issued as aforesaid to the said Charles A. B. Brackett is now, and ever since the issuance thereof has continuously been, in force and effect, and has never been cancelled, annulled, foreclosed, vacated or set aside, and that no contest or protest has ever been made or filed against the same.

32 VIII.

That on or before the 26th day of October, 1911, the petitioner herein became the owner by mesne conveyance from said Charles A. B. Brackett of a portion of said tract of land, and that final payment has been made for said tract of land in full, both of principal and interest, by the petitioner, and that the said certificate of purchase has been surrendered by said petitioner to said defendant, and that upon such surrender the petitioner paid defendant the sum of Seven (7) Dollars, as and for the fee for a patent to said lands, and then and there demanded a patent for said tract of land, but that defendant refused, and ever since has refused, and still refuses to prepare a patent for said tract of land, and to take any other steps requisite for the issuance of such patent.

IX.

That petitioner has no plain, speedy or adequate remedy in the premises by the ordinary course of law, and is accordingly entitled to the aid of this Court by its writ of mandate.

X.

That each and every allegation of the petition herein is true.

33

XI.

That each and every allegation of that portion of the amended answer to the petition constituting the first statement of defense is untrue.

XII.

That it is untrue that on May 1st, 1874, the then Register of the State Land Office of the State of California, prepared and forwarded to the District Attorney of the County of Kern a statement embracing all lands in said County upon which payment had not been made according to law; that it is untrue that said statement showed the name of the purchaser, the number and date of the survey or location, and of the certificate of purchase, the amount paid, the amount unpaid, and the amount then due; that it is untrue that said statement showed that the sum of $320.00 remained unpaid as principal, and the sum of $64.00 due as interest thereon upon January 1st, 1874, from said Brackett.

XIII.

That it is untrue that upon receipt of said delinquent list, to wit: said statement, said District Attorney did, on June 10, 1874, give notice by publication, in accordance with section 3547
34 of the Political Code, that if said amount of $64.00 due and delinquent as aforesaid was not paid within fifty days after said date, action would be commenced by him as such District Attorney to foreclose the interest of said Brackett in the lands described in said survey; that it is untrue that said description designated said lands as being held under certificate of purchase No. 2165, State School Lands, Location 776 Visalia Land District, and embracing the north half of Section 36, Township 28 South, Range 21 East, Mt. Diablo Base and Meridian.

XIV.

That it is untrue that said notice was published for four consecutive weeks immediately following said June 10, 1874, in a newspaper of general circulation printed and published at Bakersfield, in said Kern County, and circulated therein, which said newspaper was known and designated as the "Southern Californian;" that it is untrue that the first publication of said notice was made on June 11, 1874, and that the last of said publications was on July 9, 1874; that it is untrue that said published notice was dated June 10, 1874, and stated that if the amount due and delinquent upon said certificate No. 2165 were not paid within fifty days from the date

35 thereof, suit would be commenced at the expiration of said fifty days to foreclose the interest of the purchaser in the lands described therein, and to cancel and annul the certificate of purchase to the same; that it is untrue that the description of the land was the same as that last above given; that it is untrue that said amount of $64.00 so due and delinquent as aforesaid for interest, was not paid during said period of fifty days or at all.

XV.

That it is untrue that by reason of the facts set forth in paragraphs 1 to 10, inclusive, of the second separate defense set up in said amended answer, or that by reason of any thereof, or that by reason of any facts, plaintiff's cause of action is barred by the laches of plaintiff and of his predecessors in interest; and, on the contrary, that the plaintiff's cause of action is not barred by laches, and that the plaintiff has been guilty of no laches in instituting this proceeding.

XVI.

That it is untrue that by reason of the matters set forth in paragraphs 1 to 10, inclusive, of the said second defense set forth
36 in the amended answer, or that by reason of any of such matters, or any matter whatever, plaintiff's cause of action is barred by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure of the State of California; and on the contrary, plaintiff's said cause of action is not barred by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure.

XVII.

That it is untrue that plaintiff's alleged cause of action, by reason of the matters set forth in paragraphs 1 to 10, inclusive, of said second defense, or any of them, or of any matter whatever, is barred by the provisions of section 343 of the Code of Civil Procedure, and on the contrary, said cause of action is not barred by the provisions of section 343 of the Code of Civil Procedure.

XVIII.

That plaintiff's cause of action is not barred by the provisions of section 3499 of the Political Code of the State of California.

37 *Conclusion of Law.*

As a conclusion of law from the foregoing facts, the Court finds:

I.

That plaintiff is entitled to a peremptory writ of mandamus commanding defendant, in his official capacity as the Register of the

State Land Office, to prepare a patent in the name of Charles A. B. Brackett for the land described in the petition herein, and to send the same to the Governor of the State of California, together with a certificate that the laws in relation thereto have been complied with, that payment has been made in full, and that said Charles A. B. Brackett is entitled to it; and is further entitled to a judgment for the costs of suit herein.

And it is ordered that a peremptory writ of mandamus do issue, and that a judgment be entered accordingly.

Dated this 20th day of December, 1912.

J. M. SEAWELL, *Judge.*

[Duly filed December 20, 1912.]

38 [Title of Court and Cause.]

Judgment.

This action having on the 18th day of October, 1912, regularly come on to be tried by the Court, Luther Elkins, Esq., appearing as attorney for plaintiff, and Malcolm C. Glenn, Esq., Deputy Attorney General, appearing as attorney for defendant, with whom were George C. Sargent, Esq., and Jesse Olney, Esq., amici curiæ; and evidence having been introduced, and the cause having been argued by counsel and having been submitted to the Court for its decision; and the Court having filed its decision, that the plaintiff is entitled to a peremptory writ of mandamus, commanding defendant in his official capacity, as Register of the State Land Office, to prepare a patent in the name of Charles A. B. Brackett for the land described in the petition herein, and to send the same to the Governor of the State of California, together with a certificate that the laws in relation thereto have been complied with, that payment has been made in full, and that Charles A. B. Brackett is entitled to it; and is further entitled to a judgment for the costs of suit herein; and having ordered judgment to be entered accordingly;

Therefore, it is ordered, adjudged and decreed that a peremptory writ of mandamus do issue herein commanding defendant in
39 his official capacity as Register of the State Land Office, forthwith to prepare a patent in the name of Charles A. B. Brackett for the land described in the petition herein, and to send the same to the Governor of the State of California, together with a certificate that the laws in relation thereto have been complied with, that payment has been made in full, and that Charles A. B. Brackett is entitled to it, in which writ shall be inserted as the return day thereof the 31st day of December, 1912; and that plaintiff have and recover from defendant herein his costs of suit taxed at $—.

J. M. SEAWELL, *Judge.*

Judgment entered this 23d day of December, 1912, in Book 61 of Judgments Page 78.

[Filed December 23, 1912.]

[Title of Court and Cause.]

Bill of Exceptions.

Be it Remembered that the above entitled action came on for trial upon October 18th, 1912, the plaintiff appearing in person and by his counsel, Luther Elkins, Esq., and the defendant appearing by U. S. Webb, Attorney General, and by Malcolm C. Glenn, Deputy Attorney General; and George C. Sargent, Esq. and Jesse
40 Olney, Esq., appearing as amici curiæ, whereupon the following proceedings were had:

Mr. Elkins after stating the case of plaintiff, offered in evidence a certified copy of a deed from Charles A. B. Brackett, the certificate holder, to Fred W. Lake.

Mr. Glenn: We object upon the ground that it has not been shown that the original certificate is still in full force or effect; that it has not been shown that the original certificate has not been foreclosed or annulled; that it has not been shown that it has any standing whatever; that plaintiff has not proved that the original certificate is in force, or that it has any validity, and therefore it is incompetent, irrelevant and immaterial.

The objection was overruled; the deed admitted in evidence, and defendant excepted.

Said deed was then read in evidence, marked Plaintiff's Exhibit I, and is in substance as follows:

A grant, bargain and sale deed, dated February 20th, 1889, expressing a consideration of $10.00, executed by Charles A. B. Brackett to Fred W. Lake, and describing that certain parcel of land situated in the County of Kern, State of California, described as the north half of section 36, in township 28 south of range 21
41 east, M. D. B. & M., containing 320 acres, and also granting, selling, conveying and confirming unto the grantee certificate of purchase No. 2165 for the above described land, and also the grantor's rights under said certificate of purchase "which said certificate of purchase was issued to said party of the first part June 3d, 1869, under location No. 776, state school lands." Said deed was acknowledged on February 20th, 1889, before Lewis B. Harris, notary public in and for the City and County of San Francisco, and recorded on February 23d, 1889, in Book 28 of Deeds, page 384, in the office of the County Recorder of Kern County.

Mr. Elkins: We also offer in evidence a deed from Fred W. Lake and Fannie D. Lake, his wife, to B. M. Aikins.

Mr. Glenn: Same objection.

The Court: Same ruling and exception. Said deed was read in evidence, marked Plaintiff's Exhibit II. It is in substance as follows:

A deed dated October 26th, 1911, executed by Fred W. Lake and Fannie D. Lake, his wife, to B. M. Aikins, expressing a consideration of $10.00, whereby the grantors grant and convey unto the grantee "that tract of land situated in Kern County, California, and particularly described as the northwest ¼ of northwest ¼ of

42 northeast ¼ of section thirty-six (36), township twenty-eight (28) south of range twenty-one east, M. D. M., containing ten (10) acres." Said deed was acknowledged on October 26th, 1911, before Bessie G. Falvey, notary public in and for the County of Alameda, and recorded on February 21st, 1912, in Liber 263 of Deeds, page 60, in the office of the County Recorder of said Kern County.

Plaintiff then rested.

Mr. Glenn: We move for a nonsuit, upon the ground that plaintiff has not proved his case, nor denied any of the allegations of the answer. There is affirmative matter in the answer, which under the rule as established in this state, is admitted to be true, because it has not been disproved by the plaintiff. This is provided for by section 1091 of the Code of Civil Procedure. The return being made, plaintiff may countervail it by proof, but if he do not, the answer is considered true to that extent.

Plaintiff has also introduced a certified copy of a deed from the original applicant to Lake and from Lake to plaintiff. Everything else stands uncontroverted. For these reasons, we think a nonsuit should be granted.

The motion was denied and defendant excepted.

43 *Defendant's Case.*

Testimony of A. W. Sanborn.

This witness, sworn and examined for defendant, testified in substance as follows:

I am a deputy surveyor general of the State of California. I have in my hand the application of Charles A. B. Brackett to purchase the north half of section 36, township 28 south, range 21 east, Mt. Diablo Base and Meridian, containing 320 acres. It was filed on November 30th, 1868. On June 3d, 1869, a certificate of purchase was issued to him. This record does not show the date upon which payments were made. The records as to which the witness testified, were in substance as follows:

Application made by Charles A. B. Brackett to John W. Bost, surveyor general, under the provisions of an Act entitled "An Act to provide for the management and sale of the lands belonging to the state," approved March 28, 1868, for the north ½ of section 36, T. 28 S., R. 21 E., M. D. M., containing 320 acres for which the applicant agreed to pay to the State of California one dollar and twenty-five cents per acre, twenty per cent of the purchase money together with interest on the balance at the rate of ten per cent per annum in advance from the date of the approval of the location in the

44 Surveyor General's office. Said application is signed by Chas. A. B. Brackett and attached thereto is the affidavit of said Brackett as required by said Act. Attached to said application and dated November 30, 1868, is an acceptance by the Surveyor General

on the conditions that if approved it shall be for the use and benefit of the applicant on his complying with all the conditions and provisions of said Act approved March 28, 1868.

Attached to said application is an approval by the Surveyor General dated April 20, 1869, wherein the Treasurer of Kern County is authorized to receive from said Chas. A. B. Brackett one hundred and two dollars and twenty cents within fifty days from said approval, being twenty per cent. of the purchase money and interest on the balance in advance at the rate of ten per cent. per annum from the date of said approval in the Surveyor General'- Office.

Certificate of purchase issued June 3, 1869, showing that on June 3, 1869, Charles A. B. Brackett paid to the State of California one hundred and two dollars and twenty cents being twenty per cent. of the purchase money and first year's interest on the balance in advance to January 1, 1870, for the lands in the above application described. Said certificate having been issued under the provisions of the said Act of March 28, 1868, and being signed by the then Register of the State Land Office. That on April 28, 1871, a payment on account of interest *amounted* to thirty-two dollars was made; that on July 9, 1872, a payment on account of interest amounting to sixty-four dollars was made but no further payments were made on account of said certificate until October 30, 1911.

Mr. Glenn: We offer in evidence a certified copy of the judgment roll in the case of the People of the State of California versus "A. B. Brackett and John Doe, Unknown owner and holder of Certificate of Purchase No. 2165 of the following described state school lands: Location No. 776 the north ½ of section 36, township 28 south, range 21 east, Mount Diablo Base and Meridian, containing three hundred and twenty acres."

Mr. Elkins: "The plaintiff objects to the introduction in evidence of the judgment roll in the case of People v. A. B. Brackett, upon the grounds following, to wit:

1. That it appears from the face of said judgment roll and from said judgment, that said judgment was not rendered in a proceeding to which Charles A. B. Brackett was a party, but was rendered in a proceeding against A. B. Brackett, and hence, that said judgment roll and judgment is immaterial, irrelevant and incompetent in this proceeding.

2. In that it is not shown that Charles A. B. Brackett was the person designated as defendant in such suit of People v. A. B. Brackett, and that as it affirmatively appears from said judgment roll that the service of process was made constructively, to wit, by publication, and not by personal service upon the defendant herein, that in consequence it affirmatively appears that the judgment was rendered against another person, to wit, A. B. Brackett, and hence that said judgment and judgment roll is incompetent, irrelevant and immaterial in this proceeding.

3. That said judgment and judgment roll in said case of People v. A. B. Brackett, was and is void upon its face for the following reasons, to wit:

(a) In that said judgment roll does not contain any affidavit or

order for publication of summons, and that the statutes of the State of California and the decisions of the Supreme Court of said State construing said statutes, determining that said affidavit and order need not be made a part of the judgment roll, deprives the defendant of his property without due process of law in violation of sec-
47 tion 1, Article XIV of the Amendments to the Constitution of the United States.

(*b*) In that the Supreme Court of the United States has held and it is the law that in cases of constructive services of process by publication, where the statute requires an affidavit and order for publication before such publication can be ordered, that said affidavit and order must be incorporated in the judgment roll to show jurisdiction of the person, and that if not so incorporated, the record affirmatively shows that jurisdiction of the person was not obtained, and that to enforce such judgment is not alone to refuse to follow the decisions of the Supreme Court of the United States, but is to deprive the defendant therein of his property without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

(*c*) The Legislature of the State of California was without power to enact a law that a judgment roll, where jurisdiction of the person is sought to be obtained by substituted service of process by publication, shall be conclusive upon collateral attack, if such judgment omits the affidavit and order for publication required by statute be-
fore such publication can be had; and the law of this state
48 under which the judgment roll in People v. A. B. Brackett was made, providing for the omission, was and is a law depriving the defendant in this action of his property without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

4. That judgment in said case of People v. A. B. Brackett is void as to Charles A. B. Brackett, even assuming that the action was intended to be initiated against said Charles A. B. Brackett, for the reason that as no personal service was had, the constructive service of summons by publication, directed to A. B. Brackett and the decree therein attempting to foreclose the interest of A. B. Brackett, if intended to foreclose the interest of Charles A. B. Brackett in the certificate of purchase in question, deprived the said Charles A. B. Brackett of his property without due or any process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

5. A statute of a state authorizing a suit against a person by a name other than his real name, and that such person may be summoned to be served with process by constructive service, such as publication of summons directed to him under a wrong name, deprives such
49 person of his property without due process of law, and if the statutes of the State of California authorizes the institution of a suit against Charles A. B. Brackett as A. B. Brackett defendant, and the service of summons upon him constructively by publication as Charles A. B. Brackett, such statute deprives the said Charles A. B. Brackett of his property without due process of law, in violation

of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

And the plaintiff further objected, upon each and all of the grounds above stated, to the introduction of said judgment roll in so far as it was attempted to bind Charles A. B, Brackett, or the assignor of plaintiff, or plaintiff, by said judgment roll, upon service of process by publication against the defendant John Doe therein; and it was understood and agreed that each and all of the foregoing objections were made to the introduction of said judgment roll as binding upon any person who might be included within the term "John Doe."

The Court: I will admit the judgment roll, subject to your (Mr. Elkin's) objection, and subject to your motion to strike it out
50 on the grounds you have stated. Said judgment roll was then read in evidence, and is as follows:

In the District Court of the Sixteenth Judicial District of the State of California in and for the County of Kern.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
A. B. BRACKETT and JOHN DOE, Unknown Owner and Holder of Certificate of Purchase No. 2165 of the Following Described State School Lands: Location No. 776, the North ½ of Section 36, Township 28 South, Range 21 East, Mount Diablo Base and Meridian, Containing Three Hundred and Twenty Acres.

Complaint to Foreclose and Annul Certificate of Purchase of State Lands.

The People of the State of California by A. C. Lawrence, District Attorney of the County of Kern, complain of said defendants and for cause of action allege and show to the Court:

That, in pursuance of the laws of the State of California, in such cases made and provided, A. B. Brackett did apply for and thereafter, to wit: on the third day of June A. D. 1869, receive- and became the owner and holder of Certificate of purchase No.
51 2165 from the Register of the State Land Office of said State of California, under his hand and seal of office (which officer was duly authorized and empowered to issue such Certificates of Purchase), of the lands claimed by the State aforesaid, and situate in the County of Kern, and particularly described as follows:

In Location No. 776 Surveyed Lands, Visalia Land District the north ½ of Section 36, Township 28 South Range 21 East, Mount Diablo Base and Meridian, containing three hundred and twenty acres, which said Certificate of purchase did show the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest shall be computed, the amount paid, and the amount remaining unpaid, and that the amount paid on account upon the land herein described was $198.20/100 principal and interest, and the amount remaining unpaid and delinquent upon the same, according to the statement of said Register, herein-

after mentioned was and is $320.00/100 principal and $64.00/100 interest, in gold or silver coin of the United States, which sum of $64.00/100 remains wholly due and unpaid and delinquent, according to the provisions of the Political Code, Title VIII, Chapter 1, Article VI.

That said Register of the State Land Office, did, on or be-
52 fore the first day of May, 1874, to wit:

The first day of May, 1874, prepare and forward to the District Attorney of the County of Kern, (as in said law, provided,) a statement embracing all the lands in the County upon which payment had not been made, according to law; and said District Attorney did receive the same on or about the twentieth day of May, 1874.

That said statement did show the name of the purchaser, the number and date of the survey or location, and of the Certificate of purchase, the amount paid, the amount unpaid, the amount then due; and that A. B. Brackett was the purchaser, and became the owner and holder of the Certificate of Purchase, of the above described land, and paid on account therefor the sum of $198.-20/100 leaving the sum of $320.00/100 remaining unpaid as principal and the sum of $64.00/100 then and now due from said defendants as interest, on account of the purchase aforesaid, which sum of $64.00/100 — now wholly delinquent, according to the provisions of said law.

That (in accordance with the provisions of said law) the interest on any principal or balance due on the lands of the State should be due and payable in advance, and that the day and date fixed
53 and determined by said law was and is the first day of January, in each year, and that the amount unpaid as aforesaid as interest, to wit, the sum of $64.00/100 became due and payable from said defendants on the 1st day of January A. D. 1874, which sum has not been paid hitherto, or any part thereof.

That upon the receipt of the Statement aforesaid, on the twentieth day of May A. D. 1874, by said District Attorney from the Register of the State Land Office, which statement by said law, is termed and denominated "Delinquent List" said District Attorney did (in accordance with section 3547 of said Political Code, give notice, as therein provided, that on a certain day, to wit; the 10th day of June A. D. 1874, if the said amount, $64.00/100 due and delinquent as aforesaid, should not be paid within fifty (50) days after the date of giving said notice, to wit: The 10th day of June A. D. 1874, action would be commenced by him to foreclose the interest of said A. B. Brackett and John Doe, defendants in the lands herein described and to cancel and to render null and void said Certificate of Purchase.

And that said Delinquent List with said notice appended, was published for four consecutive weeks immediately following
54 the date of said notice in the "Southern Californian," a public newspaper published at Bakersfield, in the County of Kern, and circulated therein.

That the first publication thereof was made in said paper the

eleventh day of June, 1874, and the last on the ninth day of July, 1874, being published for five successive weekly issues in said newspaper.

That said publication did state that, if the amount due and delinquent, as aforesaid, was not paid within fifty (50) days from the date thereof, suit would be commenced at the expiration of said fifty (50) days to foreclose the interest of the purchasers in the land herein described and to cancel and annul the Certificate of Purchase to the same.

That fifty days have elapsed and expired since the date of giving said notice as aforesaid, before instituting this action, and the amount $64.00/100 due and delinquent as aforesaid, from said defendants, has not been paid, nor any part thereof.

That said defendants are now the lawful owners and holders of said Certificate of Purchase.

That the real name of the owner and holder of said Certificate of Purchase is unknown to Plaintiffs, and Plaintiffs ask when ascertained, that the real name of the said unknown owner and
55 holder of said Certificate may be substituted as defendant herein, in lieu of "John Doe unknown owner and holder."

Wherefore said plaintiffs ask this Court to render judgment foreclosing all the interest of said defendants in and to the Certificate of Purchase of the above described land, and that said Certificate of Purchase be canceled, and henceforth rendered null and void, and that all persons claiming under the said A. B. Brackett original purchaser of said described lands, subsequent to the execution of said Certificate of Purchase, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all right claim, or equity of redemption in and to said Certificate of Purchase, of the above described land, and that plaintiffs may have judgment and execution against said defendants for the expenses and costs of these proceedings, which cost shall include ten dollars compensation of the District Attorney, and that plaintiffs may have such other and further relief in the premises as the case may require, and as to this Court may seem just and equitable.

A. C. LAWRENCE,
District Attorney of the County of Kern.

56 Office of the County Clerk, —— County of ——.

I, —— ——, County Clerk of the —— County of ——, State of California, and ex officio Clerk of the — District Court in and for said —— County, and State aforesaid, hereby certify that I have compared the foregoing copy with the original — in the above entitled action, filed in my office on the — day of —— A. D. 187- and that the same is a full, true and correct copy of such original and of the whole thereof.

Attest my hand and seal of said Court this — day of ——, 187-.

—— ——, *Clerk,*
By —— ——, *Deputy Clerk.*

(Filed August 13 A. D. 1874. F. W. Craig, Clerk, by —— ——, Deputy Clerk.)

[Attached to the foregoing complaint, is the following:]

In this action the Defendant A. B. Brackett, et al., having been regularly served with process, and having failed to appear and answer the Plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said Defendant A. B. Brackett, et al. in the premises, is hereby duly entered according to law.

57 Attest my hand and the seal of said Court this 30th day of November, 1874.

[SEAL.] F. W. CRAIG, *Clerk.*

Summons.

Action Brought in the District Court of the Sixteenth Judicial District of the State of California and the Complaint Filed in the County of Kern, in the Office of the Clerk of said Court.

The People of the State of California send Greeting to A. B. Brackett and John Doe, unknown owner and holder of Certificate of Purchase No. 2165 of State School Lands:

You are hereby required to appear in an action brought against you by the above named Plaintiffs in the District Court of the Sixteenth Judicial District of the State of California, in and for the County of Kern, and to answer the complaint filed therein (a copy of which accompanies this Summons) within ten days (exclusive of the day of service) after the service on you of this Summons, if served within the County, if served out of this County, but within this Judicial District, within twenty days; or if served out of said District then within forty days, or judgment by default will be taken against you.

58 The said action is brought to obtain a decree of this Court for the foreclosure of the right, title and interest of Defendants in and to certain State School Lands described in the complaint and purchased by the said A. B. Brackett on the Third day of June A. D. 1869, and described as follows, to wit:

Location No. 776, of Surveyed Lands, Visalia Land District, the north ½ of Section 36, Township 28 South Range 21 East, Mount Diablo Base and Meridian, containing 320 acres; that the certificate of purchase may be cancelled and other evidence of title held by defendants be declared null and void, and for the costs of suit herein expended, and also that the said Defendants and all persons claiming by, through or under the said A. B. Brackett original purchaser of said described land may be barred and foreclosed of all right, title, claim, lien, equity of redemption, and interest in and to said premises, and for other and further relief.

And you are hereby notified, that if you fail to appear and answer

the said Complaint as above required, the Plaintiffs will take default against you and apply to the Court for the relief demanded in the complaint.

Given under my hand and the seal of the District Court of
59 the Sixteenth Judicial District this thirteenth day of August, in the year of Our Lord one thousand eight hundred and seventy-four.

[SEAL.] F. W. CRAIG, *Clerk*,
By —— ——, *Deputy Clerk.*

Attest: A true copy.
—— ——, *Sheriff*,
By —— ——, *Under Sheriff.*

Sheriff's Office, Kern County.

I hereby certify that I received the within summons on the 15th day of August A. D. 1874, and after due and diligent search I could not find either of the within named defendants in Kern County

W. R. BOWER, *Sheriff.*

Dated the 17th day of August, 1874.

[Filed this 17th day of August A. D. 1874. F. W. Craig, Clerk, by —— ——, Deputy Clerk.]

[Title of Court and Cause.]

[Here follows a copy of the summons as above given.]

STATE OF CALIFORNIA,
County of Kern, ss:

Joe K. Ackelin being duly sworn says: That he is the publisher and editor of the "Southern Californian," a newspaper published
60 in the town of Bakersfield, in the County of Kern, State of California; that the annexed and attached Summons was published in said "Southern Californian," newspaper for four successive weeks, to wit: Commencing on August 20th, and ending September 17th, 1874.

JOE K. ACKELIN.

Subscribed and sworn to before me this 12th day of November A. D. 1874.

[SEAL.] A. C. LAWRENCE,
Notary Public.

[Filed November 13, 1874. F. W. Craig, Clerk.]

[Title of Court and Cause.]

Decree Foreclosing and Annulling Certificate of Purchase No. 2165 of State School Lands.

In this action the defendant, A. B. Brackett and John Doe unknown owner, having been regularly served with process as required

by law, and having failed to appear and answer the complaint of the plaintiffs herein, and the legal time for answering having expired and the default of said defendant-, A. B. Brackett and John Doe unknown owner, having been duly entered according to law.

And said cause having been brought on regularly to be
61 heard on the thirtieth day of November, A. D. 1874, A. C. Lawrence, Esq., District Attorney of said County appearing for plaintiffs, and no one appearing on behalf of the said defendants or either of them and the same having been duly submitted to the Court and the Court having heard the proofs necessary to enable it to render judgment herein, and it duly appearing to the Court that all the allegations in said complaint are true.

That on the third day of June A. D. 1869, the said A. B. Brackett did receive and become the owner and holder of Certificate of Purchase No. 2165, and thereby became the purchaser of certain State School lands situate in the County of Kern and described in said Certificate of Purchase and the complaint herein as follows, to wit:

Location No. 776 State School Lands, Visalia Land District the north ½ of Section 36, Township 28 S. R. 21 E., Mount Diablo Base and Meridian, containing three hundred and twenty acres.

That the amount due, unpaid and delinquent as interest on the 1st day of January, 187— was $64.00.

Now, therefore, by reason of the law and the premises, it is by the Court here ordered, adjudged and decreed that all the interest of said defendants in and to the Certificate of Purchase No. 2165,
62 above described, and all the right, title and interest in and to the lands therein and hereinbefore described be foreclosed and forever cancelled, and henceforth rendered null and void and of no force, validity or effect whatever; and that all persons claiming under the said defendants, A. B. Brackett and John Doe, unknown owner & holder or either of them, subsequent to the execution of said Certificate of purchase, either as purchasers, incumbrances or otherwise, having liens upon said lands, be forever barred and foreclosed of all right, claim or equity of redemption in and to said certificate of purchase of the above described land and every part thereof, from and after the filing of a certified copy of this decree in the office of the Register of the State Land Office, and another certified copy of the Recorder's office of the County of Kern and that said certified copies be filed in said Register's and Recorder's office, within twenty days from date of entry of this decree.

It is further ordered that plaintiffs do have and recover of and from said defendants A. B. Brackett and John Doe unknown owner and holder, the sum of $110.00 the expenses and costs of this action, and that execution may issue therefor against said defendant-.

And it is further ordered, adjudged and decreed, that if
63 there be not sufficient property belonging to defendant- found to satisfy the same, and said execution be returned not satisfied, then said costs, all amounting to $119.30 be paid from the twenty per cent of the principal of the purchase money, or from the interest

paid by the purchaser at the time of the original location and entry of the land.

Done in open court the 30th day of November A. D. 1874.

THERON REED,
District Judge.

Office of the County Clerk of the —— County of ——.

I, —— ——, County Clerk of the —— County of ——, State of California, and ex officio Clerk of the — District Court in and for said —— County, do hereby certify that the foregoing copy has been compared with the original decree in the above entitled action, filed in my office on the — day of ——, A. D. 187–, and that the same is a full, true and correct copy of such original, and of the whole thereof, and that the same was entered of record on the — day of ——, A. D. 187–, in Judgment Book — page —.

Attest my hand and seal of said Court, this — day of ——, A. D. 187–.

—— ——, *Clerk*,
By —— ——, *Deputy Clerk.*

64 [Filed Thirtieth day of November, 1874. F. W. Craig, Clerk, by H. D. Bequette, Deputy Clerk.]

In the District Court of the — Judicial District of the State of —— in and for the County of ——.

—— ——, Plaintiff,
against
—— ——, Defendant.

I, the undersigned, County Clerk of the County of ——, State of —— and ex officio Clerk of the District Court of the — Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book — of said Court, at page —. And I further certify that the foregoing papers hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of said District Court this — day of ——, A. D. 187–.

[SEAL.]

—— ——, *Clerk*,
By —— ——, *Deputy Clerk.*

65 [Attached to the foregoing is the following:]

I, I. L. Miller, County Clerk of the County of Kern, State of California, and ex officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original Complaint, Summons, Affidavit of Publications of Summons, and Judgment in the Case of The People of the State of California vs. A. J. Brackett et al., in the above entitled cause, of record in my office, and that I have carefully compared the same with the original.

Witness my hand and official seal this 10th day of October, 1912.

[SEAL.] I. L. MILLER, *County Clerk*,
By —— ——, *Deputy*.

66 In the Superior Court of the County of Kern, State of California, as Successor of the District Court of the Sixteenth Judicial District of the State of California in and for the County of Kern.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs,
v.
A. B. BRACKETT, JOHN DOE, et al., Defendants.

I, the undersigned county clerk of the County of Kern, State of California, and ex officio clerk of the Superior Court of said County, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and entered and recorded in judgment book 1 of the District Court of the sixteenth Judicial District of the State of California, in and for the County of Kern, at page 204, on the 30th day of Nov., 1874.

I further certify that the foregoing papers hereunto annexed constitute the judgment roll in said action, and that said judgment roll was filed on the 14th day of October, 1912, and docketed upon the day last mentioned nunc pro tunc as of the 30th of November, 1874.

67 Witness my hand and the seal of the said Superior Court this 14th day of October, 1912.

[SEAL.] I. L. MILLER, *Clerk*,
By —— ——,
Deputy Clerk.

[Attached to the foregoing judgment roll, was the following:]

I, I. L. Miller, County Clerk of the County of Kern, State of California, and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original Judgment Roll in the case of the People of the State of California v. A. B. Brackett et al. in the above entitled cause, of record in my office, and that I have carefully compared the same with the original.

Witness my hand and official seal this 16th day of Oct. 1912.

[SEAL.] I. L. MILLER,
County Clerk,
By —— ——, *Deputy*.

A. W. SANBORN recalled:

This witness recalled on behalf of defendant, testified in substance as follows:

I have here the application of Michael Phillips upon location No. 2656, filed July 26th, 1886. Said application was offered in evidence and objected to as incompetent, irrelevant and immaterial.

68 The Court: I do not see that it is material because if the

title of the oirginal certificate holder has been extinguished by these proceedings it is entirely unnecessary.

Mr. Glenn, after arguing the point: The only reason that the Surveyor General has refused to issue a patent here is that he is not absolutely certain as to which of these parties to issue it to. His position all the time has been that he will issue the patent to whoever it may belong to, but that he cannot determine it. There is a method pointed out in the Political Code for the testing of questions of fact and questions of law; and we are putting up this defense for the purpose of showing that there is at least a color of title shown by the application.

The Court: I will overrule the objection pro forma and see what it leads to.

Said application so offered and received in evidence is in substance as follows:

Application made by Michael Phillips to the State Surveyor General wherein it is stated that the applicant desired to purchase the lands therein described that he was a citizen of the United States, a resident of the State and of lawful age and desired to purchase from the State of California under the provisions of Title VIII of the Political Code all of Section 36, T. 28 S., R. 21 E., M. D. M.,
69 situated in Kern County and containing 640 acres and which said application contained all the matters required by law to be stated, said application being signed by Michael Phillips and being duly sworn to on July 27, 1886, before James L. King, a notary public.

Attached to said application is an approval dated November 5, 1886, reciting that the said Michael Phillips having filed in the office of Surveyor General his application in due form to purchase the lands in said application described and it appearing that the said applicant has complied with all the laws of the State and that the land is not timber land and subject to sale by the State of California, the said application is hereby approved and that the County Treasurer will within fifty days from said date receive from said applicant the sum of eight hundred dollars being payment in full for said land or the County Treasurer will at the option of said applicant receive the sum of one hundred and sixty-six dollars and ninety-seven cents being twenty per cent. of the purchase money with interest on the balance at the rate of seven per cent. per annum in advance from the date of said approval. The said approval is signed by the
70 then Surveyor General and dated November 5, 1886, as above set forth.

The witness continuing, testified in substance that a certificate of purchase to Phillips was issued on December 29, 1886, and is numbered 10,300; that the record does not show what payments were made.

Mr. Sargent: I might state that that certificate went through the fire, and is extremely tender.

Mr. Elkins: We will admit the fact.

The certificate was offered and received in evidence, and is in substance as follows:

Location No. 2656, Visalia Land District December 29, 1886.

It appearing from the report of the County Treasurer that on the 22nd day of December, 1886, Michael Phillips paid to the State of California the sum of one hundred and sixty-six dollars and ninety-seven cents being twenty per cent. of the purchase money and interest on the balance up to January 1, 1887, in advance for 640 acres of state school lands described as all of Section 36, T. 28 S., R. 21 E., M. D. M. Therefore, be it Known that the said Michael Phillips having made payment of said twenty per cent and first years' interest for the above tract of land is the purchaser of the same and
71 having in all other respects complied with the requirement of the laws providing for the sale of said lands and the same having been confirmed to the State and on surrendering this certificate to the State of California the said Michael Phillips or his assigns, shall be entitled to receive a patent for the same. Said certificate is signed by H. I. Willey, Register of the State Land Office.

(The Witness continuing:) I have here the county treasurer's receipt showing that on August 28, 1911, the full amount due the state on certificate of purchase No. 10,300 was paid, and the certificate surrendered. A patent has been issued upon this application, to the south half of this section 36. This record does not show that any contest was ever instituted under Sections 3415 or 3499 of the Political Code. I am familiar with the facts of this case. The patent under the Phillips certificate has been refused by reason of the antagonistic demands of these parties for the land.

At the request of Mr. Glenn, the court then ruled that the evidence given and record produced, should go in for the benefit of all the various defenses set up by defendant.

Cross-examination of A. W. Sanborn.

Mr. Elkins handed the witness a document signed W. S. Kingsbury, State Surveyor General, and asked him if he knew the
72 signature, to which the witness replied in the affirmative. Said document was offered in evidence as a protest by Fred W. Lake.

Mr. Glenn: We object because this document is a mere protest, and not a contest. A contest must set forth the grounds of the contest. Further, it does not ask for an order of reference. We do not object to its going into the record, except that we object to it as being any valid protest. The document was admitted and read in evidence. Said document is as follows:

In the State Land Office of the State of California.

Protest and Contest of Fred W. Lake, Owner and Holder of Certificate of Purchase No. 2165, *Issued upon Location No.* 776, *Visalia Land District, Against Location No.* 2656, *Visalia Land District.*

Comes now Fred W. Lake, and files this, his protest against Location No. 2656 Visalia Land District made by Michael Phillips, and

against the issuance of any Patent or any further evidence of title upon said Location, and now opposes and contests the said location, and the Certificate of Purchase No. 10300 issued to said Phillips thereon, and demands that the said location and Certificate of
73 Purchase be vacated, annulled, and set aside. And for cause of said protest and contest protestant alleges and shows:

I.

That protestant is the assignee of record of Charles A. B. Brackett, who made location No. 776 Visalia Land District for the North ½ of Section 36, Township 28 South, Range 21 East, M. D. M. containing 320 acres in Kern County, and which said location was duly approved on or about April 20th. 1869 and upon which Certificate of Purchase No. 2165 for said land was duly issued on or about June 3rd, 1869, and that protestant is now the owner and holder of said Certificate of Purchase No. 2165, and of all rights thereunder.

II.

That said Certificate of Purchase No. 2165 has never been annulled, foreclosed, vacated or set aside but is still in full force and effect, and is now, and ever since its date of issuance has been, the only subsisting, continuing and valid Certificate of Purchase issued by the State of California for said land.

III.

That that certain purported judgment or decree of annulment against said Certificate of Purchase No. 2165, rendered in or
74 about December 1874 in an action brought in the District Court of California, in and for Kern County, to foreclose and annul said Certificate of Purchase No. 2165, wherein the People of the State of California were plaintiffs and said Charles A. B. Brackett was defendant, and of which said purported judgment or decree of annulment a purported certified copy was filed in the State Land Office on December 23, 1874, is void, and void upon its face, and affirmatively appears by the judgment roll and the record in said action to be void, for the reason that in said action no service of summons, either actual or constructive, was ever made on the defendant therein, and no jurisdiction of the defendant therein was ever acquired by the Court.

IV.

That after the rendition of said purported judgment or decree of annulment in said action, the said purported judgment or decree of annulment was by the Court therein vacated and set aside upon the ground and for the reason that it appeared to the Court from its record therein that the said purported judgment or decree of annulment had been made without jurisdiction, and without any service of summons on the defendant in said action; and it was there

75 and then found, adjudged and ordered by the Court, that there had been in said action no service of the Summons on the defendant therein, that said purported judgment or decree of annulment had been made without jurisdiction of said defendant therein, and that the same should be and thereby was vacated and set aside.

V.

That the said order of said Court, vacating and setting aside the said purported judgment or decree of annulment, is still in full force and effect, never having been modified, vacated or set aside.

VI.

That in or about May, 1886, one Michael Phillips made location No. 2656 in the State Land Office of all of said Section 36, Township 28 South, Range 21 East, M. D. M. and on or about December 29, 1886 received Certificate of Purchase No. 10300 from the State of California for said Section of land, but that said location No. 2656 as to the north ½ of said Section 36, was unlawfully and improvidently allowed, and that said Certificate of Purchase No. 10300 as to said north ½ of said Section 36 was unlawfully and improvidently issued, and that said location No. 2656 and the said Certificate of Purchase No. 10300 issued thereon and all
76 rights to said North ½ of said Section 36 thereunder are and always have been subsequent and subordinate to said location No. 776 and said Certificate of Purchase No. 2165 and the right and claim thereunder.

Wherefore protestant makes and files this, his statement of grounds of contest against said location No. 2656 and Certificate of Purchase No. 10300 issued thereon, and now protests against, opposes and contests said location No. 2656 and Certificate of Purchase No. 10300 issued thereon insofar as the said location and Certificate of Purchase refer to the north ½ of said Section 36, Township 28 South, Range 21 East, M. D. M., and objects to and protests against the issuance of any patent or other evidence of title for said North ½ of Section 36, Township 28 South, Range 21 East, M. D. M. as upon and in recognition of any rights under said location 2656.

FRED W. LAKE, *Protestant.*

Dated August 19, 1911.

77 (Letter-head of Surveyor-General.)

SACRAMENTO, September 12, 1911.

Mr. Fred W. Lake, 909 Linden Street, Oakland, California.

DEAR SIR: Herewith returned find protest and contest against location 2656, Visalia Land District, which I am prohibited, by the provisions of Section 3499 of the Political Code, from filing.

Enclosed find check 3337 for $13.00, which amount accompanied the contest.

Patent for the N. ½ of Section 36, T. 28 S., R. 21 E., M. D. M. will not be issued until it is determined who is entitled to same.

Yours respectfully,

W. S. KINGSBURY,
State Surveyor General.

Enclosures—2.
W. S. K.

78 Plaintiff, by way of rebuttal, offered in evidence a certificate of the County Clerk of Kern County, which said certificate is in words and figures following, to wit:

Register of Actions —— ——, Kern County.
School Lands.

Sixteenth District Court, Kern County.

Date August 17th, 1874.

No. of Case, 1.

THE PEOPLE, Plaintiff,
vs.
A. B. BRACKETT et al., Defendant-.

1874.
Aug. 13. Complaint filed summons issued.
Nov. 30. Default entered.
Nov. 30. Decree entered.
" " Judgment Roll filed.
1901.
Feb'y 15. Notice of motion to set aside & vacate judgment filed.
" 18. Hearing of " " " " " " " cont. to Feb. 19th, 1901.
" 19. Moving party given until Monday Feb. 25th, 1901 to file amended pleadings.
" 25. Amended motion to vacate and set aside judgment & Quash summons filed.
" " Amended motion to " " " " " " " summons heard and granted, ordered that judgment be vacated and set aside.
Mar. 1. Order vacating judgment filed and entered.

I, I. L. Miller, County Clerk of the County of Kern, and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original Register of Actions, in so far as the case within referred to is concerned; that the said Register is among the records of the said court in my keeping; and that I have carefully compared the said copy with the original; and
79 I do further certify that I have carefully examined the minute books and judgment books of the said court, all of which

are in my keeping, and the papers on file in the said case, which are likewise in my keeping and that neither the said minute books nor the said judgment books contain any entry of any order for the publication of summons in said case, and that none thereof contains any such entry, and that there is not on file in my office, and that there is not among the papers above referred to any affidavit that the defendant within named resided out of the state, or had departed from the state, or could not, after due diligence, be found within the state, or concealed himself to avoid the service of summons, or any order that the summons in said case be made by publication of the summons.

Witness my hand and official seal this 7th day of October, 1912.

[SEAL.] I. L. MILLER,
County Clerk,
By BEDELL SMITH,
Deputy County Clerk.

Mr. Glenn objected to the certificate upon the ground that it cannot be received in evidence for the purpose of impeaching a judgment roll, for the judgment roll is conclusive that it contains the papers that the statute requires it to contain; that the cer-
80 tificate of the Clerk can neither add to nor substract from the judgment roll; and that it is irrelevant, immaterial and incompetent for any purpose whatever; it shows that certain papers were filed, and that if the judgment roll shall identify those papers, well and good; but the fact that they are not found on the record cannot affect the matter in any way.

"The Court: Let the matter be submitted and I will pass upon it later when I determine the other motion.

Mr. Elkins: But it is admitted in evidence subject to the motion to strike it out?

The Court: Very well, it may be received subject to your motion to strike it out, and I will see that you are protected in that way. I will give you an opportunity to supply any evidence upon that point in case that I should decide that it is admissible.

Mr. Sargent: And will it be agreed between us that it may be taken as a correct copy of the Clerk's record?

Mr. Aikins: Oh, no, I went into the matter fully with Mr. Glenn.

Mr. Glenn: The defendant has not objected to the form of the evidence.

The Court: Well, it may be treated as if the Clerk were present and testifying.

Mr. Glenn: Very well."

81 Mr. Sargent: You (Mr. Aikins) admit in this case that an action was commenced by Fred W. Lake, before he deeded that fractional interest to you, to determine the rights of the Phillips' heirs to this land, and that this action was transferred to this court, and is now pending in this department?

Mr. Aikins: I will admit it, if you will admit that neither of us has done anything to bring that suit to trial.

Mr. Sargent: Yes, that is true.

The above constitutes all the evidence offered or adduced by either party or received by the Court.

Thereupon the cause was argued and submitted to the Court for decision and on the 20th day of December, 1912, the Court made and filed its findings of fact and conclusions of law and on the 23rd day of December, 1912, judgment in accordance therewith was entered, and thereafter on the 27th day of December, 1912, and within the time allowed by law the said defendant duly gave, served and filed his notice of intention to vacate the said decision and move for a new trial of said action which said notice
82 is in the words and figures the following to wit:

In the Superior Court of the City and County of San Francisco, State of California.

B. M. AIKINS, Plaintiff,
vs.
W. S. KINGSBURY, as Register of the State Land Office, Defendant.

To the Above Named Plaintiff and to Messrs. R. B. Henshall and Luther Elkins, His Attorneys:

You and each of you will please take notice that the above named defendant does not accept or adopt the costs claimed by plaintiff herein, but except to the same, and that the said defendant will move the above entitled court for an order taxing said costs and striking from the cost bill heretofore served and filed herein each and every item therein contained.

Said motion will be made before the above entitled Court at the court room thereof Department No. 1, at the City Hall in the City and County of San Francisco, State of California, on Friday, the 10th day of January, 1913, at the hour of 10 o'clock a. m.
83 of said day, or as soon thereafter as counsel can be heard.

Said motion will be made upon the following grounds:

1. That the items of cost and each of the same are not proper charges against the said defendant as Register of the State Land Office of the State of California;

2. That it would be improper and unjust to tax costs against said defendant, personally, as said proceeding was defended by defendant in good faith, and for the public benefit;

3. That said action was one of a public nature, and defendant was sued in his official capacity as State Register, and no costs should be taxed against him personally;

4. That costs herein are unauthorized by law. That the item of $2.50 for serving writ is excessive.

On the hearing of said motion said defendant will rely upon this notice of motion.

Dated December 27, 1912.

U. S. WEBB,
Attorney General, and
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for said Defendant.

84 *Specifications of the Particulars in Which it is Claimed and Alleged the Evidence is Insufficient to Justify, Support or Sustain the Decision or the Findings of the Court.*

I.

The evidence is insufficient to justify that portion of the decision which find- that the certificate of purchase issued to Charles A. B. Brackett is now and ever since the issuance thereof has been in force and has never been cancelled, annulled, foreclosed, vacated or set aside, in this,—That it does not appear that the holder of said certificate paid the interest due thereon as the same accrued; or that the balance due thereon was paid prior to October 26th, 1911. Further, it appears that said certificate was annulled by the judgment in the case of People versus Brackett, above referred to.

II.

The evidence is insufficient to justify the part of finding IX that the petitioner has no plain, speedy or adequate remedy in the ordinary course of law, in this,—That the rights of the plaintiff can be speedily determined in the action entitled Fred W. Lake, plaintiff, versus Sarah Phillips, et al., defendants above referred to.
85 That upon such determination, the defendant will cause a patent to be issued to the prevailing party.

III.

That the evidence is insufficient to justify the part of finding IX that the petitioner is entitled to the aid of this court by its writ of mandate, in this,—That the right of the petitioner to the patent prayed for is not clear, in that the defendant's predecessors have issued a certificate of purchase to the same lands to another party, which said certificate of purchase is still outstanding; and in that the defendant is called upon to decide questions of fact and law as to the validity of the judgment in the case of People versus Brackett, above referred to; and in that the petitioner and his predecessors in interest have been guilty of gross laches, and are therefore not entitled to the writ prayed for; and in that the claim of petitioner is barred by the statutes of limitations, to wit, section 338, subdivision 1 of the Code of Civil Procedure, and section 343 of said code; and in that the rights of the plaintiff and his predecessors are barred by the provisions of an act of the Legislature of the State of California, approved March 20th, 1889 (Statutes 1889, page 428).

86 IV.

That the evidence is insufficient to justify finding XII, that on May 1st, 1874 the register of the state land office did not forward to the district attorney of Kern County, a statement of all lands in said county upon which payment had not been made according to

law, and that said statement did not show the name of the purchaser, the number and date of the survey or location, and the certificate of purchase, the amount paid, the amount unpaid, and the amount then due, and that said statement did not show that the sum of $320.00 remained unpaid as principal and $64.00 as interest upon said Brackett certificate from January 1st, 1874, in this,—That all of said matters are alleged in paragraph II of the further, separate and second defense set forth in defendant's answer, and that no evidence was introduced by petitioner to countervail said allegations.

V.

That the evidence is insufficient to justify finding XIII that it is untrue that upon the receipt of said delinquent list, said district attorney did upon June 10th, 1874, give notice by publication, in accordance with section 3547 of the Political Code, that if said amount of $64.00 due and delinquent as aforesaid were not
87 paid within fifty days from said date, an action would be commenced by him as such district attorney to foreclose the interest of said Brackett in said lands, and that it is untrue that said description designated said lands as being held under certificate of purchase No. 2165 state school lands, location No. 776, Visalia Land District, and embracing the north half of section 36, township 28 south, range 21 east, Mt. Diablo Base and Meridian, in this,—That all of said matters are alleged in paragraph III of the further, separate and second defense set forth in defendant's answer, and that no evidence was introduced by petitioner to countervail said allegations.

VI.

That the evidence is insufficient to justify finding XIV that it is untrue that said notice was published for four consecutive weeks immediately following June 10th, 1874, in a newspaper of general circulation, printed and published at Bakersfield, in said Kern County, and circulating therein, which said newspaper was known and designated as the Southern Californian, that it is untrue that the first publication of said notice was made on June 11th, 1874, and that the last publication was made on July 9th, 1874, that it is untrue that said published notice was dated June 10th,
88 1874, and stated that if the amount due and delinquent upon said certificate were not paid within fifty days from date, suit would be commenced at the expiration of said fifty days to foreclose the interest of the purchaser in said lands, and to cancel and annul said certificate, that it is untrue that the description of the land was the same as that above given, that it is untrue that said amount of $64.00 was not paid during said period of fifty days or at all in this,—That all of said matters are alleged in paragraph IV of the further, separate and second defense set forth in defendant's answer, and that no evidence was introduced by petitioner to countervail said allegations.

VII.

That the evidence is insufficient to justify finding XV that plaintiff's cause of action is not barred by laches of plaintiff and his predecessors in interest, and that plaintiff has been guilty of no laches in instituting this proceeding, in this,—That neither plaintiff, nor his predecessors in interest, made any payments to the State of California at any time on account of said certificate issued to said Brackett subsequent to July 9th, 1872, and prior to October 26th, 1911; that plaintiff's predecessors abandoned the con-
89 tract evidenced by said certificate issued to said Charles A. B. Brackett; that neither plaintiff nor any of his predecessors in interest, sought relief from said judgment in the case of People versus Brackett in any manner whatsoever; that neither plaintiff, nor any of his predecessors in interest, made any protest against the issuance of a patent to the claimants under said Phillips' certificate, until the protest above referred to; that plaintiff has not shown that either he or any of his predecessors in interest, have ever paid any taxes upon said lands, or assumed any of the duties of ownership thereof.

VIII.

That the evidence is insufficient to justify finding XVI that plaintiff's cause of action is not barred by the provisions of Section 338, subdivision 1 of the Code of Civil Procedure, in this,—That it appears that plaintiff or his predecessors in interest could at any time within thirty-six years before the commencement of this action, have paid the balance due upon said certificate of purchase issued to said Brackett, and have obtained the relief sought in this proceeding.

90 IX.

That the evidence is insufficient to justify finding XVII that plaintiff's cause of action is not barred by the provisions of Section 343 of the Code of Civil Procedure, in this,—That it appears that plaintiff or his predecessors in interest could at any time within thirty-six years before the commencement of this action, have paid the balance due upon said certificate of purchase issued to said Brackett, and have obtained the relief sought in this proceeding.

X.

That the evidence is insufficient to justify the granting of any relief to petitioner, in this,—That it does not appear that petitioner has any interest in the contract evidenced by the certificate of purchase issued by the State of California to Charles A. B. Brackett.

XI.

The evidence is insufficient to justify, support or sustain that portion of finding seven that no contest or protest has been made or

filed against the certificate of purchase issued to Charles A. B. Brackett for the following reasons:

a. There is no evidence to justify, support or sustain such finding;

91 *b.* It appears from said evidence that on July 26, 1886, an application covering the lands described in the application of said Brackett was duly filed in the State Land Office; that thereafter the same was duly approved and on the 29th day of December, 1886, a certificate of purchase was issued to one Michael Phillips covering the lands described in the application of said Brackett, that thereby a conflict existed between the two applications and thereby a contest arose concerning the said land and the evidence of title thereto; that the said conflict and contest has never been determined or adjudicated; that said contest and conflict has existed from the date of the filing of said application by said Phillips up to the time of the commencement of this proceeding and still exists.

XII.

The evidence is insufficient to justify, support or sustain that portion of the decision which finds or determines that the petitioner has no plain, speedy or adequate remedy in the ordinary course of law, for the following reasons:

a. There is no evidence to justify, support or sustain that portion of such finding or determination;

92 *b.* It appears that at all the times since the issuance of the said Phillips certificate of purchase a method has been provided by sections 3414, 3415 and 3416 of the Political Code of the State of California whereby the said petitioner could have had adjudicated all conflicting claims and that the method of determining such conflict furnished to petitioner full and ample remedy for the securing of any relief to which he might have been entitled and is the method provided by law for the determination of such questions as is involved in this proceeding.

XIII.

The evidence is insufficient to justify, support or sustain the decision for the reason that there is no evidence to justify, support or sustain the decision.

Errors of Law.

Defendant specifies the following errors of law occurring at the trial and excepted to by defendant:

1st. The admission in evidence of the certificate of Charles A. B. Brackett, against defendant's objection that it had not been shown that the same was still in full force and effect; that it had not been shown that said certificate had not been foreclosed or annulled;

93 2d. Admitting in evidence the deed from Fred W. Lake and Fannie D. Lake, to B. M. Aikens, against the same objection;

3d. Denying defendant's motion for a nonsuit made upon the grounds that petitioner had not proved his case, or disproved any of the affirmative allegations of the answer;

4th. The admission in evidence of the document signed by W. S. Kingsbury, and offered in evidence as a protest by Fred W. Lake, against defendant's objection that the same did not constitute a protest.

5th. Finding in favor of petitioner as set forth in that part of finding XII, commencing with the words "that it is untrue" to the end of said finding, although petitioner failed to disprove the affirmative allegations of the answer set forth in paragraph II of the further, separate and second defense;

6th. Finding in favor of petitioner as set forth in finding XIII, although petitioner failed to disprove the affirmative allegations of the answer set forth in paragraph III of the further, separate and second defense;

7th. Finding in favor of petitioner as set forth in Finding XIV, although petitioner failed to disprove the affirmative allegations of the answer set forth in paragraph IV of the further, separate, and second defense;

94 8th. The rendition of any judgment in favor of petitioner for the reason that petitioner had failed to show that he had any interest in the contract between the State of California and Charles A. B. Brackett evidenced by the certificate of purchase issued to said Brackett.

Defendant respectfully submits the above and foregoing as his engrossed bill of exceptions to be used on motion for new trial herein and on appeal from judgment.

Dated March 3, 1913.

U. S. WEBB,
Attorney General, and
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for said Defendant.

The above and foregoing is hereby allowed, settled and approved as the bill of exceptions of the defendant on motion for new trial herein and on appeal from the judgment.

Dated March 5th, 1913.

J. M. SEAWELL,
Judge Superior Court.

[Endorsed: Filed March 5, 1913.]

95 [Title of Court and Cause.]

Notice of Appeal from Judgment.

To the above-named plaintiff, B. M. Aikins, and R. P. Henshall and Luther Elkins, Esqs., his attorneys, and to the Clerk of the above-entitled Court:

You and each of you will please take notice that the defendant, W. S. Kingsbury, as Register of the State Land Office, does hereby appeal to the District Court of Appeal of the State of California, in and for the First Appellate District, from the judgment made and entered in the above-entitled action in favor of the above-named plaintiff and against the above-named defendant, and from the whole thereof, the said judgment having been heretofore, to wit, on the 23rd day of December, 1912, entered in Judgment Book 61, page 78, in the office of the Clerk of the above-entitled Court.

Dated, December 30th 1912.

U. S. WEBB,
Attorney General, and
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for Said Defendant.

[Duly served on December 30, 1912, and filed on the 30th day of December, 1912.]

96 [Title of Court and Cause.]

Notice of Motion for New Trial.

To the above named plaintiff and to R. P. Henshall and Luther Elkins, his attorneys:

You and each of you will please take notice that the above named defendant intends to move the above entitled Court to vacate and set aside the decision of the above entitled Court made on the 20th day of December, 1912 and the judgment entered on the 23rd day of December, 1912, in Judgment Book 61, page 78, in favor of the above named plaintiff and against the above named defendant and to grant the said defendant a new trial herein for the following causes and reasons all of which materially affect the substantial rights of the said defendant.

1. Newly discovered evidence material for the said defendant which he could not with reasonable diligence have discovered and produced at the trial, or discovered or produced at the trial.
2. Insufficiency of the evidence to justify the decision;
3. That the decision is against law;
4. That the decision is against the evidence;
5. Errors in law occurring at the trial and excepted to by the said defendant.

97 Said application and motion will be made as to the first ground and cause upon affidavits to be hereafter prepared, served and filed and for all of the other grounds and causes hereinbefore stated, upon a bill of exceptions to be hereafter prepared, proposed, served and settled in accordance with the provisions of law.

Dated December 27th, 1912.

U. S. WEBB,
Attorney General, and
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for Said Defendant.

[Duly served on December 28th, 1912, and filed December 30, 1912.]

[Title of Court and Cause.]

Order.

The above named defendant having heretofore served and filed herein his notice of intention to vacate the decision in the above entitled action and to grant to the defendant a new trial and pursuant to said notice of intention the said defendant having, on March 14, 1913, duly made and presented his motion to vacate the de-
98 cision herein and for a new trial herein, the said motion having been made upon the following grounds, to wit:

I.

Insufficiency of the evidence to justify the decision.

II.

That the decision is against law.

III.

That the decision is against the evidence.

IV.

Errors in law occurring at the trial and excepted to by the defendant.

And having based his said motion upon defendant's notice of intention to move for new trial, the engrossed bill of exceptions filed herein on March 5, 1913 and likewise upon the judgment roll in the above entitled action and the said motion having been duly considered by the court and the court being duly advised, it is now Ordered and adjudged that the said motion be, and the same is hereby denied, to which said order the said defendant duly excepted

and the said defendant is hereby allowed ten days from and after this date within which to serve and file a bill of exceptions to
99 this order denying his motion to vacate the decision and grant a new trial herein.

Dated March 28, 1913.

J. M. SEAWELL,
Judge of the Superior Court.

[Entered March 28, 1913, in book 74 of civil minutes, page 137.]

[Title of Court and Cause.]

Notice of Appeal from Order Denying New Trial.

To the above named plaintiff and respondent, B. M. Aikins, and Messrs. R. P. Henshall, Luther Elkins and N. Schmulowitz, his attorneys, and to the Clerk of the above entitled Court:

You and each of you will please take notice that the above named defendant and appellant, W. S. Kingsbury, as Register of the State Land Office of the State of California, does hereby appeal to the District Court of Appeal of the State of California, in and for the First Appellate District, from the order of the above entitled Court made and rendered on the 28th day of March, 1913, and entered on the 28th day of March, 1913, in Book 74 of Civil Minutes of said Court, at page 137, refusing a new trial of the above
100 entitled action and denying the motion of the said defendant and appellant for a new trial in the above entitled action, and from the whole thereof.

Dated April 1, 1913.

U. S. WEBB,
Attorney General, and
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for said Defendant and Appellant.

[Duly served and filed on April 1, 1913.]

[Title of Court and Cause.]

Stipulation.

It is hereby stipulated,

1. That there may be included in one and the same transcript the appeal from the judgment herein and also the appeal from the order denying motion for new trial by defendant;

2. That the bill of exceptions on appeal from the judgment herein being the same as the bill of exceptions on motion for new trial herein, the said bill of exceptions shall be considered as and used on the appeal from the judgment and also on the appeal from the order denying motion for new trial, and both appeals shall be included in one transcript.

101 3. The transcript on appeal herein from the judgment and from the order denying motion for new trial by defendant shall consist of the following: Petition or complaint, amended demurrer to complaint, order overruling amended demurrer to complaint, amended answer of defendant, findings, judgment, bill of exceptions settled and allowed March 5, 1913, and filed March 5, 1913, notice of appeal from judgment, notice of motion for new trial, order denying motion for new trial, notice of appeal from order denying motion for new trial.

Dated April 22, 1913.

LUTHER ELKINS AND
R. P. HENSHALL,
Attorneys for Respondent.
U. S. WEBB,
Attorney General of the State of California;
MALCOLM C. GLENN,
Deputy Attorney General,
Attorneys for Appellant.

102 *Stipulation.*

It is hereby stipulated that the above and foregoing transcript is correct and that it contains true and correct copies of all the papers mentioned in the foregoing stipulation, and that the same constitutes the transcript on appeal from the judgment herein, and from the order denying motion of defendant for a new trial.

Dated May 7, 1913.

LUTHER ELKINS AND
R. P. HENSHALL,
Attorneys for Respondent.
U. S. WEBB,
Attorney General of the State of California;
MALCOLM C. GLENN,
DeputyAttorney General,
Attorneys for Appellant.

103 & 104 Supreme Court of California. In Bank.

(S. F. No. 7104.)

B. M. AIKINS, Respondent,
v.
W. S. KINGSBURY, as Register of the State Land Office, Appellant.

Aug. 3, 1915.

105 Petitioner successfully sought a writ of mandate to compel the register of the land office of the state of California to issue a patent to certain school land in Kern county. The judgment was affirmed by the District Court of Appeal of the First Appellate District, but on petition was transferred to this court. There is an appeal also from the order denying the motion for a new trial.

The essential facts are as follows:

On June 3, 1869, there was issued to Charles A. B. Brackett a certificate of purchase of the tract of land here in litigation upon the payment of part of the purchase money, namely, 20 per cent. This was in accordance with the provisions of the law (Stats. 1867-68, p. 521, §51) that 20 per cent should be payable within 50 days from the date of certificate of location issued to the purchaser by the surveyor general. The statute also provided that "the balance, bearing interest at the rate of 10 per cent per annum in advance," should be "due and payable within one year after the passage of any act of the Legislature requiring such payment, or before, if desired by the purchaser." This statute further provided (Stats. 1867-68, p. 526, Sec. 65) that upon receipt of the list required to be sent to him by the register of the land office, showing the purchasers who had not made the payments due and the amount of their delinquencies, the district attorney of the county in which the land was situated should commence a suit to foreclose the interest of such delinquent purchasers. The statute further provided that:

"If the name of the holder of the certificate be not known, he may be sued under a fictitious name, and service of the summons may be had by publication in some newspaper published in the county for four weeks; or if no newspaper be published in the county, then by posting one copy of the summons for four weeks at the court-house door of the county, and two copies in public places in the township where the land is situated."

106 Brackett made payment of interest due up to January 1, 1873, but no further payments were tendered for more than 37 years. In August, 1874, the district attorney of Kern county commenced an action to annul the certificate which had been issued to Brackett, naming as defendants "A. B. Brackett and John Doe." The summons was published, and a default judgment was entered foreclosing all interest of the defendants in the land.

In December, 1886, the register received the first payment on the purchase price of this same land from one Phillips and issued to him a certificate of purchase in due form. In 1911 the full amount due upon the said land as shown by said certificate was paid to the state.

By an act passed in 1889 (Stats. 1889, p. 428) it was provided that whenever an applicant to purchase school lands shall have failed for five years to pay the state the arrears of principal or of interest due for said land, and the state shall have issued a certificate to another purchaser prior to the passage of the said act of 1889, unless the holder of the prior certificate shall pay the entire residue of the interest remaining unpaid for such purchase within six months from and after the passage of the act, said holder shall be deemed to have lost all title to the land described in said certificate and to have surrendered all right to complete the purchase of said land and all moneys paid by such holder shall be deemed and taken as forfeited to the state.

In October, 1911, the petitioner Aikins became the assignee of all rights of Charles A. B. Brackett under his certificate of purchase, and

he tendered payment in full of principal and interest and incidental fees and demanded that a patent be issued to him. This demand was refused, whereupon he proceeded by petition for mandamus as set forth above.

Appellant contends: (1) That the foreclosure proceeding against "A. B. Brackett and John Doe" was efficient and sufficient
107 to oust Charles A. B. Brackett from all interest in the land; (2) that the act of 1889 did not operate as an impairment of the contract between Brackett and the State, and that therefore under the provisions of said act Brackett's interest in the land was terminated; (3) that petitioner's rights are barred by laches and by the statute of limitations; and (4) that mandate will not lie to determine the conflicting claims of petitioner and Michael Phillips, but that such conflict must be settled under an order of reference by the register under sections 3414 and 3415 of the Political Code. At the oral argument, however, we instructed counsel to confine the discussion to two matters: The question of the constitutionality of the act of 1889, and the alleged laches of the petitioner. The conclusion which we have reached makes it unnecessary to consider the other points.

Petitioner's position is that the act of 1889 impairs the obligation of his contract, because, as he asserts, the statutory provision for foreclosure and redemption existing at the time of Brackett's purchase formed a part of the agreement. Assuming, without deciding, that the attempted foreclosure by the action of the state against "A. B. Brackett and John Doe" was void, let us determine whether or not the petitioner was entitled under his contract to the sort of procedure provided in the then existing act, and no other, in any effort on the part of the state to deprive him of his interest in the lands. It is to be noted that the procedure outlined in sections 65 and 66 of the act of 1868 was not expressly made a part of the contract. We have set out the former section in substance above. The latter gave the holder of a certificate of purchase 20 days after a decree of forfeiture and before copies of such decree had been filed with the register of the land office and the recorder of the county, during which time he might redeem by paying to the sheriff of the county in which the property was situated the amount due to the state. But we do not think the method of terminating the rights of a defaulting purchaser under the act of 1868 was exclusive. It was merely a
108 method of declaring a forfeiture. If the petitioner was in default, he may not complain because the state has established a method of declaring a forfeiture different from the judicial procedure authorized by the statute at the time of his purchase. At the most, he may only complain if the later procedure imposes upon him more onerous conditions than the former. It is sometimes difficult to draw the line between legitimate alterations of a remedy and provisions which impair a right (McCauley vs. Brooks, 16 Cal. 31), but we find no such difficulty here. The provisions of section 66 of the law of 1868 with respect to the entry of judgment and the filing of certified copies thereof and the period of redemption are all but matters of procedure which a purchaser is not entitled to enjoy without change provided the substituted procedure was not more onerous

than that of the earlier statute. No actual notice of the entry of judgment or the filing of copies was required under the act of 1868. The notice was not necessarily personal, and the purchaser was charged with the same degree of constructive notice by the act of 1889. The act of 1889, instead of giving to the holder of a certificate of purchase only 20 days after a declaration of forfeiture in which to redeem by paying up the arrears, gave him six months for the accomplishment of that result. The later was therefore more liberal to the holder of a certificate of purchase than was the earlier act. A judgment procured under the procedure provided by the act of 1868 amounted to a declaration of forfeiture or rescission which would become final unless within twenty days the arrears should be paid, and the same is true of the conditional forfeiture declared by the act of 1889, except that the period of redemption was very much longer, and therefore very much more favorable to the delinquent purchaser. The passage of an act providing a new remedy for the state as a contracting party does not necessarily deprive the other party to the contract of his rights. When Brackett entered into the agreement for the purchase of the school land, he obtained nothing but the right to acquire a title by compliance with the terms
109 of his agreement. One of the requisites was the payment of interest in advance, and when he violated that stipulation in the contract he was in default, and the state had the same right that an individual would have possessed to rescind the agreement. The right to rescind and a method of asserting that right were both preserved by the act of 1868, but the method was not exclusive, nor was it the sole measure of the power. A remedy may be given where none existed before, and it follows that a new and more liberal remedy may be substituted for one which was in effect at the time the contract of sale was made. Fristoe v. Blum, 92 Tex. 84, 45 S. W. 998. In the later case of Standifer v. Wilson, 93 Tex. 232, 54 C. W. 898, Fristoe v. Blum was approved and the whole subject received careful attention. The facts in the later Texas case were practically identical with those before us here, involving, in exactly the same way, the state's right to provide a new procedure for declaring a contract at an end on failure of the vendee to pay to the state arrears of interest. That case went to the Supreme Court of the United States, and the judgment was affirmed. Wilson v. Standefer, 184 U. S. 399, 22 Sup. Ct. 384, 46 L. Ed. 612, in which, by the way, the spelling of the name of the defendant in error differs from that used in the Texas report, Mr. Justice Shiras, in preparing the opinion of the Supreme Court of the United States, adopted a portion of the opinion of the Supreme Court of Texas, and that language is so thoroughly applicable to the problem before us that we in turn quote a part of it, as follows:

"The statute of 1879 does not give authority to any officer to rescind without judicial action; but the right of rescission existed in the state, and its exercise might be subsequently authorized through the law-making power, and an exercise of it, based upon the default of the other party, would not be a denial of any right of his. It could

only be held that the right of rescission for default of the purchaser did not exist by holding that the contract provided that it should not exist, or that it should be exercised in a particular manner; but the contract embraces no such provision. There is no undertaking on the part of the state with the purchaser that the remedy prescribed in this statute, and no other, shall be pursued, unless it is to be implied from the mere presence of the provision in the statute, and we think it is well settled that no such implication arises. In the proposition often stated in the decisions that parties contract with
110 reference to existing laws, and that such laws become a part of the contract, the reference is to those laws which determine and fix the obligation of the contract, the correlative rights and duties springing from it, and not to laws of mere procedure prescribing remedies. With reference to these, there is ordinarily no obligation arising, but the contract is made in contemplation of the power of the Legislature to change them. Of course, all remedy cannot be taken away, nor can the existing remedy be so altered as to take away or impair any of the rights given by the contract as interpreted by existing law. * * * The act of 1897 simply enforces a right which existed in the state from the formation of the contract. It takes away no right of the purchaser, unless it can be said that he had the right to demand that the particular remedy provided by the act of 1879 should be followed. This could only be true if the contract made that remedy exclusively applicable, which was not the case."

In the course of the opinion of the Supreme Court of the United States the learned justice said:

"It is apparent that the purchaser was not deprived by the act of 1897 of the right to be heard in a court of justice as to the fact of payment. His position under that act was quite as favorable as under the prior act of 1879. It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

He also quoted the language of Mr. Chief Justice Marshall in Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529:

"The distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and, without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

In Waggoner v. Flack, 188 U. S. 595, 23 Sup. Ct. 345, 47 L. Ed. 609, it was held that where the act under which a purchase of land was sought to be made, and under which the vendee had made his initial payment, contained no provision for rescission for failure to make future payments, the obligation of the contract was not violated by a subsequent act granting a remedy to the state but providing a reasonable period of redemption.

Applying the reasoning of these cases to the one at bar, we are convinced that the act of 1889 is not unconstitutional as impairing the obligation of a contract.

It is argued that the act of 1889 sought to take from the
111 holder of a certificate his property, without due process of
law. It is true that when a state enters into a contract as a
vendor of land it is subject to the same rules that govern private
parties to such agreements, and the argument is made that the state
is not in a position to rescind without restoring the money paid by
Brackett during the early years of the existence of the certificate.
There are two answers to this. The first is that the act of 1868 gave
the state the power to cause the annulment of the contract as against
one in default without the restoration of the part payment. The
second answer is that the forfeiture, or, more properly speaking, the
rescission, is based upon undoubted arrears of interest payment of
which was of the essence of the contract of purchase. The state, the
vendor, had a right under the act of 1868 to rescind because of fail-
ure to pay interest, although no act had been passed prescribing the
time when final payment of the principal should be due, and the
procedure outlined in that statute did not make a return of money
previously paid, either as the purchase price or as interest, a con-
dition precedent to the successful maintenance of an action of fore-
closure against one delinquent in the payment of interest. The act
of 1889 therefore deprived the holder of the certificate of no right
possessed by virtue of the earlier statute, to the restitution of money
previously paid. Our conclusion therefore is that the statute of 1889
is not unconstitutional as depriving delinquent purchasers of prop-
erty without due process of law.

The statute which we have been discussing is also attacked because
of alleged want of uniformity of operation. It is said that the law
operated alone upon those in default whose lands, or the land
claimed by them, had been subsequently sold. But we fail to see
any injustice in the classification. The Legislature was held to no
uniformity of classification except to treat all of a given class in the
same way. The classification adopted is just and was intended
112 to protect persons who had acquired rights in the belief that
the earlier certificates had been abandoned. We conclude
therefore that the act of 1889 was in all respects constitutional.

Appellant contends that the delay on the part of Brackett and his
associates, extending over many years, amounted to laches, and this
as the learned attorney-general insists, is true whether we consider
the foreclosure suit in which judgment was given against "A. B.
Brackett and John Doe" in 1874 as being void upon its face or not.
Without reference to the validity or infirmity of that judgment
these facts are evident: Brackett was in default January 1, 1873.
Phillips has possessed since 1886 a certificate which was prima facie
evidence of title. Section 3514, Pol. Code. Since 1889 the statute
has declared the effect of the later certificate if uncontested, yet no
until 1911 did Brackett's successor seek to make payment of any
sort to the state. For more than 38 years no attention was paid to
the obligation to pay interest in advance each year to the state.
Meanwhile the state had at least attempted foreclosure proceedings
and in 1889 had constructively notified all persons interested in the
matter of the intention to disregard any asserted rights to the land

arising under the Brackett purchase unless the arrears should be paid, yet nothing was done by the holder of the certificate which had been issued to Brackett until after the completion of the sale to Phillips. Under these circumstances, the statute of limitations, which was pleaded, clearly applies. Barnes v. Glide, 117 Cal. 7, 48 Pac. 804, 59 A. M. St. Rep. 153. While this is in form an action at law to compel the performance by an officer of the state of a duty imposed upon him by statute, it is in effect an action to require specific performance on the part of the state, and the laches of the petitioner may be shown to defeat his purpose. We are convinced that the petitioner slept upon his rights and should not now be heard, after the lapse of many years, to assert his claim. Kleinclaus
113 v. Dutard, 147 Cal. 246, 81 Pac. 518; Hynes v. M. J. & M. M. Consolidated, 168 Cal. 654, 144 Pac. 144; Emerson v. Kennedy, etc., Co., 169 Cal. 718; 147 Pac. 939.

The judgment and order denying a new trial are reversed, and the superior court directed to enter judgment dismissing the petition for a writ.

We concur: Henshaw, J.; Melvin, J.; Lorigan, J.; Shaw, J.; Sloss, J.; Lawlor, J.; Angellotti, C. J.

114 [Endorsed:] No. S. F. 7104. In the Supreme Court of the State of California. B. M. Aikins, Plaintiff and Respondent, vs. W. S. Kingsbury as Register of the State Land Office, Defendant and Appellant. Decision of the Supreme Court of the State of California.

115 Copy.

In the Supreme Court of the State of California. Bank.

S. F. No. 7104.

B. M. AIKENS, Plaintiff and Respondent,

vs.

W. S. KINGSBURY, as Register of the State Land Office, Defendant and Appellant.

On Appeal from the Superior Court in and for the City and County of San Francisco.

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the judgment and order denying a new trial of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same are hereby reversed, and the superior court directed to enter judgment dismissing the petition for a writ.

Respondent to recover costs of appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 3d day of August, 1915, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 3d day of September, A. D. 1915.

[SEAL.] B. GRANT TAYLOR, *Clerk*,
By A. S. RAMAGE, *Deputy*.

116 [Endorsed:] No. —. In the Supreme Court, State of California. Remittitur. —— ——, vs. —— ——. Clerk's Costs, $—. Paid by Appellant, $—. Paid by Respondent, $—. Total, $—. B. Grant Taylor, Clerk, by —— ——, Deputy.

117 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between B. M. Aikens, plaintiff and respondent, and W. S. Kingsbury, as Register of the State Land Office, defendant and appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said B. M. Aikens as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full
118 and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the 20th day of July, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

119 [Endorsed:] Original. S. F. 7104. In the Supreme Court of the United States. Original. B. M. Aikens, Plaintiff and Respondent, vs. W. S. Kingsbury, as Register of the State Land Office, Defendant and Appellant. Writ of Error from Supreme Court of the United States to the Superior Court of the State of California. The within and a copy of Writ of Error is hereby lodged in the office of the Clerk of the Supreme Court of the State of California for the benefit of defendant in error therein named. R. P. Henshall, Attorneys for Plaintiff and Respondent and Plaintiff in error. Filed Aug. 9, 1916. B. Grant Taylor, Clerk, by Dryden, Deputy.

120 UNITED STATES OF AMERICA, *ss:*

To W. S. Kingsbury, as Register of the State Land Office, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington within sixty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the Supreme Court of the State of California, wherein B. M. Aikins is Plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this 20th day of July, in the year of our Lord one thousand nine hundred and sixteen.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

121 Due service is hereby admitted this 2nd day of August, 1916, of the Citation issued by the Supreme Court of the United States against W. S. Kingsbury as Register of the State Land Office of the State of California in the action now pending in said United States Supreme Court at Washington and upon which a writ of error was issued by an Associate Justice of said court and filed in the Clerk's office of the Supreme Court of California. In said action B. M. Aikins is plaintiff and W. S. Kingsbury as Register of the State Land Office of California, is defendant.

W. S. KINGSBURY,
Register of the State Land Office of the State of California,
By D. J. SHIELDS, *Ass't.*

Due service of the within citation and receipt of a copy thereof, admitted this 3rd day of August, 1916.

U. S. WEBB,
Attorney General of the State of California, Attorney for the within Named S. W. Kingsbury, as Register of the State Land Office.

Due service of the within citation and receipt of a copy thereof, admitted this 9th day of August, 1916.

U. S. WEBB,
Attorney General of the State of California, Attorney for the within Named W. S. Kingsbury, as Register of the State Land Office.

122 [Endorsed:] Original. No. 7104. In the Supreme Court of the United States. Original. B. M. Aikins, Plaintiff in Error, vs. W. S. Kingsbury, as Register of the State Land Office, Defendant in Error. Citation. Filed Aug. 9, 1916. B. Grant Taylor, Clerk, by Dryden, Deputy.

123 Know all men by these presents, That we, B. M. Atkins, as principal, and Maryland Casualty Company, as Surety, are held and firmly bound unto W. S. Kingsbury, as Register of the State Land Office of the State of California, in the full and just sum of five hundred (500) dollars, to be paid to the said W. S. Kingsbury, as Register of the State Land Office of the State of California, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 31st day of July, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a term of the Supreme Court of the State of California in a suit depending in said Court, between B. M. Aikins, Plaintiff and Respondent, and W. S. Kingsbury, as Register of the State Land Office of the State of California, Defendant and Appellant, a judgment was rendered against the said B. M. Aikins, and the said B. M. Aikins having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. S. Kingsbury, as Register of the State Land Office of the State of California, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof.

Now, the condition of the above obligation is such, That if the said B. M. Aikins shall prosecute said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void: else to remain in full force and virtue.

B. M. AIKINS, *Principal.* [SEAL.]
MARYLAND CASUALTY COMPANY,
By WALTER B. WENZ, [SEAL.]
Attorney in Fact.
Attest:
ARTHUR H. CONNOLLY, *Attorney in Fact.*

Sealed and delivered in presence of
H. B. McFARLAND.
CHAS. A. CURTZON.
H. J. GOLDEN.

Approved by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

124 [Endorsed:] No. S. F. 7104. In the Supreme Court of the United States. B. M. Aikins, Plaintiff in Error, vs. W. S. Kingsbury, as Register of the State Land Office, Defendant in Error. Bond on Writ of Error. Filed Aug. 24, 1916. B. Grant Taylor, Clerk Supreme Court. T. Filed Aug. 30, 1916. B. Grant Taylor, Clerk Supreme Court. M.

125 In the Supreme Court of the United States.

B. M. AIKINS, Plaintiff and Respondent,
vs.
W. S. KINGSBURY, as Register of the State Land Office, Defendant and Appellant.

Assignment of Errors.

And now comes B. M. Aikins, plaintiff in error herein, and makes and files this, his Assignment of Errors herein:

I.

The Supreme Court of the State of California erred in reversing the judgment and order denying a new trial herein and in directing that final judgment be entered in favor of the defendant.

II.

The Supreme Court of the State of California erred in holding, in its opinion and decision herein, that the equity of redemption or right to redeem within one year from and after a final decree foreclosing the predecessor in interest of plaintiff in error herein, *out of*
125½ any interest in the certificate of purchase in suit, had been extinguished by the Act of the Legislature of the State of California, referred to in its opinion herein; and the said Act of Legislature, referred to in said opinion, held to extinguish such equity of redemption or right to redeem, impaired the obligation of a contract between the plaintiff in error and the State of California, in violation of Section 10 of Article I of the Constitution of the United States.

III.

The Supreme Court of the State of California erred in holding that the aforesaid Act of 1889 forfeited the rights of the predecessor of the plaintiff in error herein under the certificate of purchase, referred to in said opinion, and such Act, when given the construction to it as is given by the Supreme Court in its opinion and decision herein, deprived the plaintiff in error of his property without due process of law, in violation of Section 1, of Article XIV, of the 14th Amendment of the Constitution of the United States.

IV.

The ruling and holding of the Supreme Court of the State of California, in its opinion and decision herein, that the Act of 1889 cut off, extinguished and forfeited all rights of the plaintiff in error herein in and to the certificate of purchase in question, was and is error, because such Act, so construed in said opinion, deprived the plaintiff in error herein of his property in said certificate of purchase without due process of law in violation of Section 1 of Article XIV of the 14th Amendment of the Constitution of the United States.

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V.

The ruling and holding of the Supreme Court of the State of California herein, that the Act of 1889 extinguished, cut off and forfeited all the rights of the plaintiff in error herein in and to the certificate of purchase in question, without any judicial proceeding being instituted to accomplish that purpose, or that said Act cut off and extinguished the right of plaintiff in error to said certificate or his right of equity of redemption therein, was and is error, because said Act, as so construed by said Supreme Court of the State of California, impaired the obligation of the contract subsisting between the plaintiff in error and the State of California at the time said certificate of purchase was issued, in violation of Section 10 of Article I of the Constitution of the United States.

VI.

The ruling and holding of the Supreme Court of the State of California herein that the cause of action in favor of plaintiff in error herein for the issuance of a patent, based upon his certificate of purchase, which had been paid up in full, at the time when the same was in full force and effect and when the equity of redemption therein had not been extinguished, cut off or forfeited by any judicial proceeding, was barred by any Statute of Limitations herein, was and is error.

VII.

The ruling and holding of the Supreme Court of the State of

California herein that the cause of action in favor of plaintiff in error herein for the issuance of a patent, based upon his certificate
127 of purchase, which had been paid up in full at the time when the same was in full force and effect and when the equity of redemption therein had not been extinguished, cut off or forfeited by any judicial proceeding, was barred by laches, was and is error.

VIII.

It appearing from the opinion and decision of said Supreme Court of the State of California herein that plaintiff in error herein was the owner of a certificate of purchase to certain lands, issued by the State of California, upon which payment had been made in full in the year 1911, that no judicial proceeding had ever been instituted at any time under which pursuant to any judgment of any court the property right of the plaintiff in error or the predecessor of the plaintiff in error had been cut off, extinguished or forfeited, or whereby the equity of redemption, given and granted to the plaintiff in error and to his predecessor by the Statute at the time the said certificate of purchase was issued, to-wit, a right to redeem at any time within twenty days after the entry of a final judgment foreclosing said equity of redemption and within one year thereafter, and it further appearing that the plaintiff in error had demanded the issuance of a patent from the proper officer, appellant herein, after the payment in full under the circumstances set forth,—the ruling and holding of the Supreme Court of the State of California herein that the Act of 1889, referred to in said opinion, cut off, extinguished and forfeited all property rights of the plaintiff in error herein, or his predecessor, in and to said certificate of purchase and in and to his equity of redemption therein,—was
128 and is error, for the reason that such Act, as so construed, deprived plaintiff in error of his property rights in said certificate of purchase without due process of law, and further, the cutting off and extinguishing the equity of redemption, vested in plaintiff in error, impaired the obligation of the contract subsisting between the plaintiff in error, his predecessor, and the State of California; that such right of redemption should exist until extinguished by the judgment of a court of competent jurisdiction, and for a specified time thereafter, and the ruling and holding of the Supreme Court of the State of California in the premises, that such equity of redemption or right to redeem and the exercise of such equity of redemption or the right to redeem, when the same had not been extinguished, cut off or forfeited by any judgment of any Court, had become barred by laches or limitation, impaired the obligation of the contract with respect to such right of redemption, theretofore subsisting between the plaintiff in error and the State of California.

IX.

The only effect of the decision of the Supreme Court of the State of California in this case is to hold that the equity of redemption,

vested in plaintiff in error by law at the time the certificate of purchase was issued by the State herein, and now owned by the plaintiff in error herein, to-wit, a right to redeem within twenty days after a final judgment foreclosing upon said certificate, and within one year thereafter, had been shortened, cut off, extinguished and forfeited by the Act of 1889, and such Act, as so construed, im-
129 paired the obligation of the contract with respect to such equity of redemption, existing between the plaintiff in error herein and the State of California, in violation of Section 10 of Article I of the Constitution of the United States.

Wherefore, plaintiff in error prays that the judgment and decision of the said Supreme Court of the State of California be reversed and that the judgment and order of said Superior Court, originally entered herein, be affirmed, and that the cause be remanded to the Supreme Court of the State of California, with directions to affirm the judgment and order of said Superior Court.

R. P. HENSHALL,
Attorney for Plaintiff in Error.

130 [Endorsed:] S. F. 7104. In the Supreme Court of the United States. Original. B. M. Aikins, Plaintiff and Respondent, vs. W. S. Kingsbury, as Register of the State Land Office, Defendant and Appellant. Assignment of Errors. R. P. Henshall, Attorney for Plaintiff in Error. Filed Aug. 9, 1916. B. Grant Taylor, Clerk, by Dryden, Deputy.

131 In the Supreme Court of the United States.

B. M. AIKINS, Plaintiff and Respondent,
vs.
W. S. KINGSBURY, as Register of the State Land Office, Defendant and Appellant.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes B. M. Aikins, plaintiff in error, and respectfully prays for a reversal of the judgment of the Supreme Court of the State of California, which judgment was rendered and entered on the 3rd day of August, 1915, and in and by which judgment the final judgment of the Superior Court of the State of California, in and for the City and County of San Francisco, rendered on the 23rd day of December, 1912,—being the judgment from which the appeal was taken to the said Supreme Court,—was reversed and the cause remanded with directions to dismiss the petition of the said B. M. Aikins.

And said plaintiff in error prays for a reversal of said judgment in all particulars pursuant to the assignment of errors herewith.

B. M. AIKINS,
Plaintiff in Error.

R. P. HENSHALL,
Attorney for Plaintiff in Error.

132 [Endorsed:] In the Supreme Court of the United States. S. F. 7104. Original. B. M. Aikins, Plaintiff and Respondent, vs. W. S. Kingsbury, as Register of the State Land Office, Defendant and Appellant. Prayer for Reversal. Filed Aug. 9, 1916. B. Grant Taylor, Clerk, by Dryden, Deputy.

133 In the Supreme Court of the State of California.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, hereby certify that the papers contained in the foregoing transcript, to-wit:

Transcript on appeal,
Opinion of the California Supreme Court, and judgment of said Court,
Original writ of error,
Original citation,
Copy of bond,
Original assignment of errors, and
Prayer for reversal,

form a true and complete transcript of record in the case of B. M. Aikins vs. W. S. Kingsbury, Register of the State Land Office of California, appellant, S. F. number 7104, in this Court.

In witness whereof I hereunto set my hand and affixed the seal of said court this 24th day of August, A. D. 1916.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

Endorsed on cover: File No. 25,492. California Supreme Court. Term No. 662. B. M. Aikins, plaintiff in error, vs. W. S. Kingsbury, as Register of the State Land Office. Filed September 16, 1916. File No. 25,492.

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Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1917

No. 265

B. M. AIKINS,

Plaintiff in Error,

vs.

W. S. KINGSBURY, as Register of the State Land Office,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

R. P. HENSHALL,
Attorney for Plaintiff in Error.

...NAU-WALSH PRINTING CO., SAN FRANCISCO

In the Supreme Court
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OCTOBER TERM 1917

No. 265

B. M. AIKINS,
Plaintiff in Error,

vs.

W. S. KINGSBURY, as Register of the State Land Office,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief for defendant in error has very much clarified this case. It has rendered clear beyond doubt that the only controlling question in the case is a Federal question. By dwelling upon certain facts, of which no special note was made in our opening brief, it has demonstrated that the decision by the state court of this question was error. It has

the temerity to urge that the judgment should be affirmed in this court, upon state grounds, which were *not decided* by the state court, and which impliedly concede, not alone the controlling character of the Federal question, but the erroneous decision of it. Finally it misstates and misquotes the law of California upon these questions, so that, even if open here, this court would be misled as to their proper disposition. It is proper for us to point out, in their order, the correctness of these statements just made, and this we proceed to do. And when this has been done, it is respectfully submitted that we shall have disposed of this case.

(1) According to our view the controlling question in this case, has always been this: Could the state, by subsequent legislation,—here the act of 1889,—impair or cut off the right to redeem from a foreclosure sale,—in this case the right to redeem within twenty (20) days after the judgment in the foreclosure suit resulting in the sale—granted by the statute in force at the time the contract with plaintiff's assignor was originally made? We have never been able to see how this question could be answered, other than in the negative; and such was the opinion of Judge Seawell and the District Court of Appeal, basing their conclusion upon this court's decision in

Barnitz v. Beverly, 163 U. S. 118, and cases following it.

To avoid the effect of this principle of law, which is apparently conceded to be as we claim it (Attor-

ney Gen. Brief, pp. 18-19), a proposition is advanced which carries with it its own death wound. It is urged that the foreclosure proceedings were commenced under the original act to foreclose upon the certificate of purchase, now held by plaintiff in error, and that this proceeding resulted in a judgment foreclosing the purchaser, following which the twenty (20) day period referred to, during which the right of redemption could be exercised, has of course expired. *If this be true, there is an end of our case upon the merits.*

The facts referred to by the attorney general in support of this contention are as follows: Under the original law, quoted by us, in our opening brief in full, a suit to foreclose this certificate was commenced on August 13, 1874 (Tr. p. 25, fol. 56), which resulted in an attempted decree of foreclosure on November 30, 1874 (Tr. pp. 26-28, fols. 60-63). The equity of redemption expired *in this event* (the event of the validity of the judgment) under that statute, not later than December 20, 1874.

But the trial court, the District Court of Appeal, and the supreme court, each held or conceded, this judgment to be void upon its face (Tr. p. 14, finding VII, fol. 31; Appendix to Op. Br. pp. iii, iv; Tr. p. 47, fol. 107). This judgment is the one now urged upon the court, "as an additional reason why it should not assume jurisdiction" (brief p. 10). And this court is asked to affirm the validity of this judgment, held to be in-

valid by the state court. But to do this, of course, this court must first take jurisdiction of the case, and reverse the adverse judgment of the state court, upon this point. It is difficult to perceive how this is an additional reason for not taking jurisdiction!

But this is not all. The decision of the state court, that the judgment referred to is void, is conclusive upon this court. The proceedings in the suit, which culminated in this void judgment, are in the record (Tr. pp. 22 et seq.), were introduced on the trial, and even now are relied upon by the attorney general in this court. What is the result? The judgment being void the action is still pending, undecided, undetermined. It can still be brought on for trial. Judgment can still be entered in it. Now, if the fact be, as is the fact, that this can still be done, what is the position of the parties? The answer is plain. If judgment were entered tomorrow in this action, *the plaintiff in error would have twenty (20) days thereafter within which to redeem, and wipe out the foreclosure sale.* Of course, if he could do it after foreclosure judgment he could do it before the judgment was entered.

And strange to say, this is exactly what has been done. Pending the very action which the attorney general refers to—the very action in which the void judgment was rendered and upon which he places his reliance—*the plaintiff in error paid* the state all that was due it. And so we repeat that by relying upon the foreclosure proceedings, the attorney

general has dealt his own case its death blow. For, there being no valid judgment yet entered in the foreclosure proceedings, which the attorney general pleads, who can doubt the right of the successor of the defendant therein,—the plaintiff in error—to pay the state the amount it sued for, before judgment, when he would still have twenty (20) days to pay up, after judgment, in the event that judgment therein should ever be entered. And this payment has actually been made.

It should be remembered that it is the attorney general who pleads, offers in evidence, and now relies upon these state foreclosure proceedings, which have not yet culminated in a valid judgment; and in which we still have the right of redemption, within twenty (20) days after judgment, if judgment shall ever be entered therein.

And this leads the attorney general into another and more dangerous difficulty. His position is, in short, that the right of redemption, granted by a state statute, can be cut off by subsequent legislation, so as to deprive a party of its exercise *even in a pending judicial proceeding.* The authority in support of this proposition has not been, and we think never can be cited. The attorney general at least has not referred to it.

The judgment here then upon the attorney general's own theory, is error, and must be reversed. For it appears now that pending the judicial proceedings, to foreclose upon the certificate of pur-

chase, the amount sued for has been paid the state; and it ought to be admitted that we could do, pending the proceeding, the very thing, which the proceeding itself was brought to compel us to do.

(2) The fact that the plea of the statute of limitations and laches are inseparably connected with the validity of the act of 1889 appears conclusively from the following quotation from the attorney general's brief (p. 13):

> "Regardless of its validity as to the matter of impairment of contracts or other constitutional provisions, *it was an act regularly passed and therefore a legislative declaration of a position to be thereafter assumed by the state with reference to contracts* of the character represented by the Brackett certificate. Whether the state might legally thereafter by reason of such act maintain the position therein declared was not material—it was thereby asserting an intention to assume thereafter a position which might be subversive of any rights held by a certificate holder who was in default in the payment of interest. *The enactment of such statute was notice to all such certificate holders of the position to be thereafter assumed by the state,* and whether such position might thereafter be successfully maintained or not *it was an act which had the effect of starting the statute of limitations to running, at least at the expiration of the six months' period therein given to such certificate holders to pay up their arrears of interest or have their rights forfeited.*"

After this language, any further argument showing that the state court did not decide,—indeed that it could not have decided—the case upon the

statute of limitations independently of the validity of the act of 1889 would be an unnecessary trespass upon this court's time. For this court is asked by the attorney general to hold the cause of action barred because the act of 1889, *whether unconstitutional or not,* put the statute in motion!

(3) On page 21, reference is made to a question, which was not decided by the state supreme court, —a state question—and consequently not open to discussion here. The point urged is, that a vendor is not obliged to sue a defaulting vendee—he may stand on his contract without suing. The answers are plain:

(a) The state court makes no such decision here of this purely state question;

(b) The rule has no application, where the contract itself, as here, gives a right of redemption to the vendee, after bre ch by him—a point which the attorney general continually overlooks; and

(c) Here an action was actually brought to foreclose the vendee's rights; and consequently the following portion of Glock v. Howard, 123 Cal. 1, 10, quoted by counsel is against him:

> "Now, as the vendee in default may maintain such an action, so may the vendor call the defaulting vendee into a court of equity and compel him to show why all his rights under the contract should not be held to be at an end. The vendor when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title. In some

> forums this is designated an action for rescission. With us it is commonly called an action to foreclose the vendee's rights."

Of course, where an action "to foreclose the vendee's rights" is commenced, under a statute, which gives the vendee a right of redemption, this right of redemption cannot be taken away by subsequent legislation.

(4) On page 16, the attorney general says:

> "It is to be borne in mind that under the act of 1868, to which the purchaser subscribed, no actual notice to him by personal service was required in the foreclosure proceedings. Service of the summons might be made by publication."

This is a curious error. For the state supreme court has held from an early day to a late day,—and its decision on this point is conclusive—that personal service must be had on the defendant—(except, of course, when compliance with the general law providing for substituted service might be had, *which there is no pretense has ever been done in this case),* in proceedings under the act of 1868, as well as in other cases.

People v. Herman, 45 Cal. 689;
People v. Applegarth, 64 Cal. 229;
People v. Mullan, 65 Cal. 396;
People v. Greene, 74 Cal. 400;
People v. Pearson, 76 Cal. 401;
People v. Temple, 103 Cal. 453;
People v. Harrison, 107 Cal. 544;
People v. Mulcahy, 159 Cal. 34.

(5) The attorney general apparently concedes the unconstitutionality of the act of 1889, so far as it affects the right to exercise the original equity of redemption. For he treats the six months' period given by the act of 1889, as the equivalent of the judgment under the act of 1868, and adds the 20 day period to it. To do him no injustice we quote him (p. 20):

> "At most he can claim only that the rights which accrued to him upon such forfeiture shall not be different under the later procedure from what they were at the time he purchased. What, then, were those rights? Merely to come in and pay within twenty days after such forfeiture the amount for which he was in default and be restored to his rights. Assuming that of this right he could not be deprived, he was then privileged to come in within twenty days after the six months specified in the act of 1889, pay up the amount of his default and be restored."

This remarkable statement is repeated more than once. It is found on pages 19 and 23 of his brief again. Its answers are plain.

(a) No such holding can be found in the decision of the state supreme court, to be reviewed here.

(b) Nor can it be found in the act; which is specific that the payment must be made "within six months from and after the passage of this act" (see act quoted on p. 14 of Op. Brief).

(c) It would in that event be open to the objection which the state supreme court itself urged in

Taylor v. Johnson, 150 Cal. 201, quoted by us on page 39 of our opening brief; and lastly

(d) The act is still objectionable (aside from its abrogation of the equity of redemption) because it fails to provide for any hearing at any time in a court of justice, *a point nowhere* discussed or even noticed by the *attorney general, though his own cases of Waggoner v. Flack,* 188 U. S. 595, *and Wilson v. Standfer,* 184 U. S. 399, *are direct authorities on this point.*

See opening brief, pp. 30 to 39.

(6) The attorney general only cites four cases in his brief. Of these, Glock v. Howard, 123 Cal. 1, and Smith v. Blandin, 133 Cal. 441, are on points of state law which the state court here refused to discuss or decide. Waggoner v. Flack and Wilson v. Standefer, supra, are authorities, as we have pointed out, that *some remedy* in a *court of justice must be provided,* before such an act as the one in question can be sustained, and are therefore authorities against him. We have noticed his error in saying that no personal service of summons was required under the act of 1868. Even the state supreme court made some curious errors with respect to the statutes governing this case. These errors are most admirably pointed out in the brief of the amicus curiae as follows (p. 21):

> "The State Supreme Court entertained several obvious misconceptions of the terms and the meaning of the Brackett contract. It regarded the annual payment of interest by Brackett as an absolute obligation, and the

neglect by Brackett to do so as a default, overlooking the alternative agreement that Brackett could pay later by paying a penalty for the delay, and overlooking the fact that Brackett could not be in default upon his interest payment until this alternative right had run out. The court speaks of the state's right to rescission as a right to terminate the contract by a mere declaration instantly that Brackett was behind in an annual interest payment, forgetting the prescribed mode of rescission—or rather of cancellation—reserved by the state and assured to Brackett by the contract itself. The court says that time was of the essence of the contract in respect of Brackett's obligation to pay interest annually, whereas not a word in the contract anywhere gives expression to any such condition. The court remarks that for a long term of years no attention was paid to the obligation to pay interest in advance each year, again overlooking the fact that there was no *obligation* to pay in advance, and overlooking the correlative and equally reprehensible neglect of the state for the same period to exact payment by suit in the way alone that it was entitled to exact payment. The court speaks of the conditions in the contract wherein the parties agreed upon the modes by which it might be abrogated as only remedies, which the legislature has power to alter."

These criticisms are just, as will be seen by referring to the law, quoted by us in our brief, in full (pp. 3 et seq.).

We note, also, that nowhere in the opinion of the state supreme court are the laws of 1868 correctly stated or quoted. There are over 69 material sections of those laws (see Op. Br., pp. 3 et seq.),

most of which pass unnoticed in the opinion here (Tr. p. 46). The act of 1889 claimed to be unconstitutional is not even quoted verbatim, though its substance is given. Reference is made to certain sections of the Political Code in the opinion, which were not in force when the Brackett certificate was issued, and, in consequence, are without bearing on the case (see Tr. p. 47, where Pol. Secs. 3414-15 are cited). Even the statute of limitations referred to was not in force when the Brackett contract was made, as it was not enacted until March, 1872 (C. C. P. Chapter III, 1872).

These many errors and misconceptions by court and counsel both may have led to the erroneous conclusion that the act of 1889 was constitutional, which is the conclusion sought to be reversed. To us, it appears clearly to be unconstitutional; it destroyed (the attorney general admits it destroyed) a vested equity of redemption; it deprives one party to a contract of his right to be heard in a court of justice *at any time,* with respect to his rights under the contract. The decision sustaining it should be set aside; and we respectfully submit accordingly.

Dated, San Francisco,
April 12, 1918.

R. P. HENSHALL,
Attorney for Plaintiff in Error.

In the Supreme Court

OF THE

United States

October Term, 1917

No. 265

B. M. AIKINS,

Plaintiff in Error,

vs.

W. S. KINGSBURY, as Register of the State Land Office,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

By a Friend of the Court

The writer asks leave of Court to file this brief as a friend of the Court on behalf of Plaintiff in Error by way of supplement to the brief already filed by plaintiff's counsel because, while not a party to the record, he is co-owner with Plaintiff in Error in the title to the property here litigated, and will gain or lose by the decision of this Court in common with the Plaintiff in Error.

STATEMENT.

The case has been stated at length and correctly by plaintiff's counsel, but we ask leave to succinctly restate it, in order to include some facts which counsel has omitted and which we think the Court should notice, and to give completeness and regularity to our brief. It is, we deem, more important to get the case upon its facts clearly before the Court than to argue it.

In 1869 the State of California entered into an express contract with one Charles A. B. Brackett for the purchase and sale of a tract of land belonging to the State. The contract was signed, on the part of the State, by its land officer, who acted under laws authorizing such contracts and directing him to act, and which laws in careful detail set out every term and condition that should form the contract. Those laws are, of course, the terms of the contract and the measure of the mutual rights and obligations existing under it. Part of the purchase price of this land, paid and accepted, was an element of the consideration moving the State to make the contract. One dollar an acre of the purchase price was left unpaid, to run at interest. The contract recited that this unpaid balance might be paid at any time at the option of the purchaser, but should not become due until one year after the passage of an act of legislature calling it—an act that was never passed. It was provided that interest on this unpaid balance should be payable annually in advance; that if not so paid, the State should have the right to bring an action in its courts to annul the contract and declare forfeited the money paid, the form and manner of procedure being set out in very explicit detail, and including a warning notice by publication and the lapse thereafter of fifty days be-

fore the suit would lie. It was also provided that at any time during these proceedings the purchaser could halt them by paying the interest accrued and the costs up to that time, and further that for a period of twenty days after the entry of a judgment he could redeem by paying the accrued interest and all the costs. By an act of legislature passed in 1881 and never repealed the State enlarged this right of redemption to one year, (Stat. Cal., 1881, p. 65), and as this is one of the facts overlooked by plaintiff's counsel in his statement we here call it to the Court's attention, and for the convenience of the Court print it further on in this brief.

In 1874 the State brought an action to annul the contract, but misnamed Brackett, the necessary defendant, and made no service of process although there was a defective attempt at service by publication. A judgment was entered but it was not against Brackett and rested upon no process. The trial Court in the case at bar found that the warning notice preliminary to the annulment action was never either prepared or published, and this finding has never been disturbed. The trial Court also found and held and the District Court of Appeal in turn found and held that the judgment in the annulment action was void upon its face and without process of law, and the Supreme Court did not disturb, but tacitly approved this finding and decree. There is, therefore, before this Court upon this writ of error no question about the effect of the annulment proceeding or the void judgment therein entered.

In 1886 the State land officer entered into a similar contract of sale for the same land with one Phillips. This contract, confessedly, was *ultra vires* and void, for the power of the officer in making such contracts

was expressly limited by the law to lands which were unsold, and it was also expressly provided in the terms of Brackett's contract and the law that no further sale or contract of sale of the land should be made until, by such a suit as the State retained the right to bring, Brackett's contract should be annulled and his period of redemption after judgment should have expired.

It is inferable, of course, that the State land officer in contracting with Phillips viewed the Brackett contract as annulled. It is, perhaps, immaterial to the case at bar whether the Phillips contract be regarded as void, or as junior to the Brackett contract.

In 1889 the State by an act of its legislature declared a change in the terms of its contract with Brackett, and warned him that he could have six months and no more in which to pay up the arrearages of interest upon his contract, the contract to stand valid and continuing if he so paid, but to be deemed abandoned by Brackett and to be treated as cancelled if he did not, and this without notice or procedure of any kind. (Stat. Cal., 1889, p. 428.) The act was frankly on behalf of Phillips, and intended to feed the Phillips title by legislating the Brackett title out of existence. It in terms applied, not to contracts like the Brackett contract as a class, not to any group of such contracts or titles in which by reason of its intrinsic merits the Brackett contract could be classified, but only to certain contracts where the land covered by them had been afterwards erroneously or inadvertently sold or contracted by the State land officer to another. The constitutionality of this act of legislature is the fundamental, and, we think, the only question in the case at bar. Brackett ignored this act.

In 1901 the pretended judgment in the annulment action brought by the State in 1874 against the Bracket contract was vacated by order of the Court in which it was entered. This order was granted upon motion and after hearing, the State being the party adverse to the motion. This is another fact overlooked in his statement by counsel for Plaintiff in Error, and which therefore we here bring to the attention of the Court. (Tr., f. 78.)

After this, so far as the record shows, all parties in interest, the State, Phillips, Brackett, and the successors in interest respectively of Phillips and Brackett were quiescent for some ten years. In 1911 almost simultaneously both Phillips and Plaintiff in Error as successor in interest to Brackett paid the State in full for the land under their respective contracts. The State accepted these payments without question from both and covered the money into the State treasury, thus treating both contracts as subsisting. The Brackett contract expressly providing that upon completion thereof by payment in full a State patent for the land should issue to Brackett or to his assigns, the action at bar in mandamus was brought to obtain the patent. The State, or the defendant in error as the State's officer, never offered to return the money accepted from Plaintiff in Error in 1911, and never in any way suggested its return, or that it had been wrongfully received.

Under the record, none of the parties claimant ever maintained possession of the land. There is no claim or assertion of possession at any time, for any period, by the State, or Brackett, or Phillips, or by any one claiming under either. Nor is there any act shown which is construable into an affirmative assertion of

a claim to the land except the proceeding in 1901 upon motion to vacate the judgment in the annulment case, and that in some degree was an assertion of a continuing claim under the Brackett contract, and except the payments in 1911 which were, of course, clear assertions of a right to title from the State under the contracts.

To the complaint of Plaintiff in Error for a mandamus to compel the issuance of patent under the Brackett contract the Defendant in Error, in his official capacity as the State land officer, interposed several pleas and among them that the Brackett contract had been destroyed by the act of legislature of 1889, and that plaintiff's cause of action had become barred by either of several pleaded statutes of limitation of the State and by the laches of plaintiff and of his predecessor, Brackett. Plaintiff in Error in the trial Court and at every step in the State Courts appropriately challenged the act of 1889 and the pleas founded upon it on the ground that the act is in conflict with the Constitution of the United States. All of the pleas were overruled by the trial Court and in turn upon appeal by the District Court of Appeal, but the State Supreme Court finally sustained the act of 1889 as constitutional and defendant's plea that by that act the Brackett contract had been annulled, and also in rather uncercertain and obscure language went some way toward sustaining the plea of the bar of the statutes of limitation, and, perhaps also, the plea of laches. The language of the State Supreme Court in that part of its decision which touches upon defendant's pleas of limitation and of laches is not as clear and conclusive as could be wished, and it is a part of the task of this Court, perhaps the preliminary task, to determine just what upon these questions the ruling of the State Court

is. It is plaintiff's understanding of the State Court's decision against him, and the interpretation which he now presents to this Court, that the single and controlling issue in the whole case is the constitutionality of the legislative act of 1889, and that the pleas of limitation and of laches were founded upon that statute, and their sustainment follows as a consequence upon the sustainment of the constitutionality and effectiveness of that statute,—that the statute being found valid, and construed to be such legal notice to Brackett of the State's intention to dispute the continuing validity of his contract as then laid upon him the duty of moving and the risk of quiescence, time began to run against Brackett from the date of the statute, and thereafter, because of his silence and because of the running of time thus put in motion, his righs became eclipsed,—his cause of action barred by a State statute of limitation, and, perhaps, his claim of title to the land and his claim to specific performance of his contract barred by his neglect. We say *perhaps* as to the plea of laches because, as we shall in our following argument point out, we read the decision of the State Supreme Court as not having passed upon or sustained the plea of laches at all, but only the plea of limitation.

BRIEF.

In its superficial aspect the decision against us brought here by writ of error has some appearance of having been rested upon two distinct grounds, one the constitutionality of the legislative act of 1889, and the other the bar of a State statute of limitation. Superficially and at first blush it may seem, therefore, that we were denied our claim in the State Courts not only

because of the act of legislature challenged as infringing the federal constitution, but also and separately because, independent of that act, the cause of action upon our claim was barred by a State statute of limitation. We are aware, of course, that under the well settled rule of this Court our cause here may be dismissed without consideration of the federal question involved if the State Court rightfully sustained against us the plea of the statute of limitation, and if that plea was quite separate and apart from the challenged act of legislaure and was in and of itself so sufficient and rightful that a decision disposing of our case could be rested upon it without consideration of the act. We are frankly apprehensive of this superficial aspect of the case, and frankly concerned lest this busy Court be misled by this surface appearance. We earnestly solicit the Court's patient analysis of the case upon its real and actual merits, to the end that we may not be hastily denied the protection we here seek under the Constitution if we are truly entitled to it.

It is, we think, the only rational interpretation of the equivocal and rather unhappy language of that part of the State Supreme Court's decision which is addressed to the plea of limitation, that that plea is sustained because the validity of the act of legislature of 1889 is susained, and that the act of legislature is the genesis of the plea. The act, it will be noticed, is a legislative warning to Bracket and other holders of like contracts with the State that they "shall be deemed to have lost all rights to the land" contracted for unless, within the term of six months then fixed, they shall come in and reassert their right to the land and continue the contract in force by paying up the claimed arrearages of interest. The Court says of this statute, in passing upon the plea of limitation, that by it in

1889 the State "had constructively notified all persons interested in the matter of the intention to disregard any asserted rights to the land under the Braekett purchase *unless* the arrears should be paid," and then goes on to say: "yet nothing was done by the holder of the certificate which had been issued to Brackett"; and then through this reasoning reaches the conclusion that *"under these circumstances* the statute of limitation, which was pleaded, clearly applies." The thought that seems to be here expressed is that the State, by this act of legislature, forced Brackett to affirmatively act in support of his contract or be deemed to have lost his rights; that the act was valid and such purpose proper; and that there thus was put in motion a right and a correlative duty of Brackett's to assert or reassert his right to the land. But because Brackett did not do so, did not act under that statute but ignored it, *"under these circumstances"* he could not afterwards be heard to deny that he had waited too long.

It is plain from the act itself that Brackett had not been barred by limitation or laches *before* its passage in 1889, although he had then held his contract from the State for twenty years. The act itself is a distinct and unequivocal legislative recognition of the continuing existence of Brackett's rights, and of like rights under like contracts with the State even though interest payments were in arrears as much as five years, and yet the statute of limitations applied in the case at bar is three years. The act not only recognizes such claims as alive, even against such adverse or junior claimants as Phillips, but sets their duration forward six months. Nothing can be plainer than that if the act of 1889 is valid, and if the suit at bar had been brought within six months after its passage, a plea of limitation or of laches could not have been successfully set up against

Plaintiff in Error. The unescapable inference from the decision of the State Supreme Court before us is, we think, that in such case the plea could not have been sustained.

It is significant that in the whole judicial history of California no reported case has ever arisen where, except in the case at bar, the State has, under like facts, resisted execution of its similar contract by a plea of limitation or laches. There are, and long have been, many thousands of such contracts outstanding. The certificate of purchase issued to Braekett as early as 1869 was numbered 2165 (Tr., f. 50). That the annual payment of interest was often passed by contractors with the State for long terms of years, and that the Sate by reason of such delay never resisted enforcement of its contract but always accepted the money, is inferable in the first place from the fact of acceptance here shown of the delayed payment made of Plaintiff in Error. In further evidence we find two reported cases where it incidentally appears that arrearages of interest, in one case for ten years and in the other for twelve, were paid up and were accepted without demur.

Dorn v. Baker, 96 Cal., 206;
Hyde v. Redding, 74 Cal., 493.

Laches and limitation never commenced to run against Plaintiff in Error, therefore, according to the State Court's decision, until after the enactment of 1889. Without that enactment the situation of the parties to the contract before and after that date, their respective rights and obligations, were identical and unchanged. Without that enactment time can no more have run after 1889 than before. Except for that enactment, therefore, time has not run, and without it

there has been no starting point for laches or limitation. Wemust assume, even if we cannot clearly extract it from the language of its decision, that the State Supreme Court held the cause of action of Plaintiff in Error not barred by limitation or laches until after 1889, for we cannot attribute to the Court such a conflicting and irreconcilable decision as that the act of 1889 was valid and effective according to its terms, and yet that Brackett's claim, expressly recognized and continued in force by the act, had theretofore been extinguished.

Nor should we, in construing the State Court's ambiguous opinion in order to ascertain what was finally adjudged upon what issues, attribute to the Court conclusions which are legal absurdities when we can with equal facility and reason read the opinion as reaching other conclusions which, if wrong, are colorable and not unreasonable. Understanding the Court to say that the act of 1889, being valid, laid an affirmative duty upon Brackett to act and so put in motion limitation and laches which in time become effective bars against him, we have a decision the course of reasoning for which we can follow. But if we read the Court's decision as saying that the cause of action set up by Plaintiff in Error was barred without regard to the act of 1889—that it would have been held barred if that act had not been passed—then we have a conclusion that shocks by its amazing error, a conclusion so one-sidedly and patently wrong, so entirely against every settled principle of the law of the question, as to be altogether incredible.

The action at bar was to compel by mandamus the issuance of a patent for the land contracted to Brackett. The State Supreme Court correctly says in its

opinion that the purpose and effect of the action is to enforce specific performance by the State. The Brackett contract was an express agreement by which the State agreed to sell and Brackett to buy a described parcel of land at some future time, the time when the sale should take place being indeterminate, to be fixed by Brackett at any time at his option by the payment of the money, or to be fixed by the State through an act of legislature calling for the payment. The State never called, and Brackett never paid until 1911, following the payment with the suit at bar almost immediately and within any possible statute of limitation. Limitation runs against the cause of action after it has accrued. The plea of the statute of limitation can run to nothing else. The cause of action here very definitely and explicitly set up was the right to a patent after payment, the right to a conveyance from the State in execution of its contract after Brackett's successor had performed,—a right not in existence until payment had been made.

Laches—the plea of laches was not in fact ruled upon by the State Supreme Court, as we shall further on point out, and so is not in view of this Court—laches no less than limitation is altogether beside the mark. It is the well settled rule in California that laches can never be applied for any period of time short of the applicable period of limitation unless certain particular facts come in which invoke equity by showing that the opposing party was misled by the delay and that hardship or injustice resulted.

Lux v. Haggin, 69 Cal., 225;
Cook v. Ceas, 147 Cal., 618;
Furman v. Crane, 121 Pac., 1009.

In the record here there is not a fact or the suggestion of a fact to show that the State or any one else has ever been misled or harmed by the delay of Brackett or of his successor in interest in enforcing the Brackett contract. The case is, it will be remembered, between the parties to that contract, between the State and the purchaser of its land, for the final enforcement of a contract made years ago and to be performed at an indefinite time in the future, but which was in abeyance by the acquiescence of both parties,—neglected by them both if you please—for a long term of years. It was a contract which by its clear terms was to run on until halted by one event or another that was expressly provided for. The State could terminate it, in certain ways, when it chose. Brackett could terminate it, in certain ways, when he chose. Neither chose to act for a long time—just let it run. Then Brackett's successor came in and, in explicit adherance to the terms of the contract, paid up. The State accepted the money. There isn't any movement of laches under such a state of facts. If there was neglect of the contract, it was mutual. But the very contract itself contemplated the very thing that happened. By it the State in substance said to Brackett: "I'll sell you this land when you get ready to pay for it, unless I terminate the agreement sooner in one of the ways reserved"; and Brackett responded: "I'll buy at some time in the future, if the agreement has not then been terminated." It is quite in the nature of business transactions that such a contract should run on and on. And it is altogether out of the question for one party to charge the other with laches for merely letting it run on. The State can't stand silent while it is running, endure the passing of time without complaint, at last accept payment under the contract without demur, and *then* resist execution upon the plea that its adversary was neglectful.

So we cannot believe that the State Supreme Court sustained or ever thought of sustaining against us either of the pleas of limitation and laches independent of the act of legislature of 1889. We cannot attribute such a crass judicial solecism to that high and the able Court. We apprehend that that Court intended only to say, and we read its opinion as saying, that the whole case at bar turns upon the statute of 1889 which, being held valid, had among other legal effects that of raising up and starting forward against Brackett, should he flout the warning of that statute by silence, the ultimate bars of limitation and laches. There is in the paragraph of the opinion within which lies all that is said upon the subject this significant declaration: "Since 1889 the statute has declared the effect of the later certificate (the Phillips contract) if uncontested, yet not until 1911 did Brackett's successor seek to make payment of any sort to the State." We can understand this as construing the act of 1889 as a legislative effort to prefer Phillips against Brackett, as it plainly enough was, and we may even infer that it was in the mind of the Court that by this act Phillips acquired some superiority of position which put Brackett to an affirmative assertion of his right within such time as equity or law would permit. We might even infer that it was in the mind of the Court that such effect resulted from the act even if otherwise ineffective. But we can find no room for the inference, where the Court with such particularity has tied to the act of 1889 as its justification for sustaining limitation or laches, that a thought was in the Court's mind of those pleas apart from that act.

We have linked laches with limitation in our discussion but, as we shall now point out, there is no judg-

ment against us upon the plea of laches. The defendant set up against us the equitable plea of laches as well as the legal plea of limitation, but upon his plea of laches both the trial Court and the Court of appeals found and held against him, and the Supreme Court left their judgment in this respect undisturbed. We are driven to find this fact from a somewhat careful reading of the last Court's opinion, but the fact is, we think, plain enough. The Court said, after a cursory notice of some facts about the invalid foreclosure suit of 1874, the alleged default of Brackett in interest payments in 1873, the issuance of the Phillips certificate in 1886, the effect of the statute of 1889 in favor of that certificate and the State's intention thereby declared to disregard Brackett's right unless he should pay the claimed arrearages of interest, and that Brackett's successor did not pay up until after Phillips had paid:

> "Under these circumstances the statute of limitations, which was pleaded, clearly applies. (*Barnes* v. *Glide*, 117 Cal. 7.) While this was in form an action at law to compel the performance by an officer of the state of a duty imposed upon him by statute it is in effect an action to require specific performance on the part of the state and the laches of the petitioner may be shown to defeat his purpose. We are convinced that the petitioner slept upon his rights and should not now be heard after the lapse of many years, to assert his claim."

There is here sustained the formal legal plea of limitation, but nothing more. Nothing is charged or found against us but the mere efflux of time. That builds up the defense of the statute of limitation, but standing alone does not build up the defense of laches. "Laches in legal significance is not mere delay, but

delay that works a disadvantage to another," (1 Pomeroy Eq. Rem. §21), or as this Court has said:

> "Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced—an inequity founded upon some change in the condition or relation of the property or the parties." (Galliher v. Caldwell, 145 U. S., 368.)

We are surely not to strain and extend the opinion of the Court by inference so far as to make a judgment against us upon the plea of laches when no fact is found or stated to sustain such a plea, and the Court stops far short of any declaration that we guilty of laches.

We understand, then, that the State Supreme Court held limitation applicable only as collateral to the act of legislature of 1889, only as a consequence of that act and as a lawful and rightful effect of that act. If this is so, then the entire case at bar as now before this Court turns upon federal questions. If the attack by Plaintiff in Error upon the constitutionality of the act of 1889 succeeds, and that act fades out of view as a lawful measure, the plea of limitation justified upon it fades with it. Even if the act be treated as effective only to give a starting point to limitation, it is still an act open to the charge, which from the beginning was made against it, that it impairs the obligation of the State's contract.

And again beyond all this, in any view and upon whatever statute of California the plea of limitation against us is placed, we find that it is nevertheless open to the same challenge,—for every statute of limitation that may by any inference be taken to have been applied is subsequent in date to the Brackett contract.

There are a number of definite and different statutes of limitation in the California law, all found in sections 312 to 363, inclusive, of the Code of Civil Procedure. The sections that were invoked by Defendant in Error in his pleadings are 338 and 343 (Tr., f. 10). The Supreme Court in its decision names neither section, but cites the case of Barnes v. Glide, 117 Cal., 7, where section 338 was applied. These laws were enacted after the making of the Brackett contract in 1869, section 338 having been enacted on March 11, 1872 (Code of Civil Procedure, 1872, Chapter III).

The application of either one of them to the curtailment of Brackett's rights, therefore, independent of the act of 1889, is the application of a subsequent statute in impairment of the obligation of the State's contract. If the legislature of California in 1872 had passed an act of limitation declaring in terms that contracts with the State like Brackett's were to be thenceforth subject to such limitation, and if such enactment impressed upon the Brackett contract a condition not of the contract and which diminished Brackett's rights under the contract, it is quite plain that such act would be open to the constitutional challenge of impairment. And when a general statute is by the Courts given the same specific application and effect, it is in the same way open to the same challenge.

Our course of reasoning to this point has been addressed to the effort to show that the decision of the State Supreme Curt upon the question of limitation was not, in any possible view, a decision upon a non-federal question. We have been, perhaps, rather diffuse and rather over-anxious in our argument, but we have been frankly apprehensive, as we stated in the beginning, over the unfortunate and erroneous surface

appearance of the case at bar as having been decided against us on a non-federal question of limitation, apart from the constitutional questions revolving about the act of legislature of 1889.

The constitutionality of the act of legislature of 1889 is challenged upon three federal grounds: That it impairs the obligations of the State's contract with Brackett, that it deprives Brackett of his property—his subsisting title to the land under the contract—without due process of law, and that it denies to Brackett the equal protection of the law.

The State, of course, contracted with Brackett as proprietary and not as sovereign, and in entering into the contract stepped off its pedestal of sovereignty and contracted on the same plane as an individual, with the same rights and obligations.

> Davis v. Gray, 16 Wall., 205;
> Hall v. Wisconsin, 103 U. S., 11.

The contract is express, every one of its terms being found in writing in the land laws of the State which particularly authorized it and declared how it should be entered into, and it includes also all of the laws, State or Federal, then in force, which prescribe the mode of enforcing it.

> Barnitz v. Beverly, 163 U. S., 122;
> Welch v. Cross, 146 Cal., 621.

In entirely clear and unmistakable terms the contract provided for the sale by the State and the purchase by Brackett of a tract of land at some future but indeterminate point of time. The State had the right

to make the time determinate by calling for payment through an act of legislature and giving one year's notice (Stat. Cal., 1867-8, Sec. 51; Political Code, § 3494). Brackett had the right to make the time determinate by payment of the purchase price. These were exclusively the ways by which, under its express terms, the contract could be brought to final execution. The act of 1889 baldly declared the contract at an end and cancelled at the expiration of six months after its passage unless Brackett did certain things.

The contract provided that it could be cancelled byeither party in certain prescribed ways. Brackett could abandon it by surrendering his certificate evidence of it and reconveying his title thereunder to the land back to the State. (Stat. Cal., 1867-8, Sec. 64; Political Code, §3570.)

The State could annul it by way of penalty against Brackett, if Brackett were in arrears of annual interest payments, by a suit in foreclosure in the State Courts and the recovery of a judgment of annulment therein, Brackett to have a right to defend in that suit, a right tointerrupt it at any stage by payment, and a right to redeem within twenty days after judgment. This suit could be brought only after a warning notice had been published giving Brackett fifty days within which to avoid it by payment of interest (Stat. Cal., 1867-8, Sec. 6, 65, 66; Political Code §§3456-3556, inclusive). The act of 1889 undertook to give the State a new and more expeditious method of cancellation, by mere force of this legislative enactment, without suit, and without notice or opportunity to be heard.

The agreement for interest payments was alternative. It was mutually agreed that Brackett should

pay the interest annually in advance, in which case only simple interest would be payable, *or* that he could wait for the warning notice and then pay interest and the cost of the notice, or wait further for the suit to go to judgment and then pay the interest and all accrued costs, including a ten dollar fee to the State's attorney. Naturally, if to a suit threatened or brought he had a defense on the merits for any reason, he would wait upon and rely upon the right of redemption after judgment. (Statutes cited *supra.*)

The act of 1889 shut up all this procedure, shut off the right to defend in the suit and the right to redeem after judgment, and substituted itself for the procedure provided in the contract for the annulment of the contract.

The State had in 1881 by statute enlarged the right of redemption after judgment from twenty days to one year, as follows:

> *"An Act entitled an Act to enable purchasers of State lands to redeem the same, where their titles have been or may hereafter be foreclosed for non-payment of interest.*
>
> [Approved March 7th, 1881.]
>
> *"The People of the State of California, represented in Senate and Assembly, do enact as follows:*
>
> "SECTION 1. In all cases where the title of purchasers of land from the State has been foreclosed, or attempted to be foreclosed, or that may hereafter be foreclosed, for non-payment of interest, said purchasers, their executors, administrators, or successors in interest shall have, twelve months after said foreclosures are or have been completed, within which to redeem such land by paying to the County Treasurer, for the benefit of the fund, or parties entitled thereto, all delinquent interest,

and interest that would have accrued in case there had been no foreclosure; also, all costs of foreclosure to be paid to the fund, or the parties who paid said costs. When said payments are made, and indorsed on the certificate of purchase, specifying the amount paid as interest and for costs, and duly reported to the Register of the Land Office, the annulments shall be canceled by said officer, and the rights of the purchasers shall thereby be fully restored.

"SEC. 2. This Act shall take effect and be in force from and after its passage." (Stat. Cal. 1881, p. 65).

The act of 1889 fixed the period of six months after its passage as the utmost duration of time within which Brackett might pay up.

The State Supreme Court entertained several obvious misconceptions of the terms and the meaning of the Brackett contract. It regarded the annual payment of interest by Brackett as an absolute obligation, and the neglect by Brackett to do so as a default, overlooking the alternative agreement that Brackett could pay later by paying a penalty for the delay, and overlooking the fact that Brackett could not be in default upon his interest payment until this alternative right had run out. The Court speaks of the State's right to recission as a right to terminate the contract by a mere declaration instantly that Brackett was behind in an annual interest payment, forgetting the prescribed mode of recission—or rather of cancellation—reserved by the State and assured to Brackett by the contract itself. The Court says that time was of the essence of the contract in respect of Brackett's obligation to pay interest annually, whereas not a word in the contract anywhere gives expression to any such

condition. The Court remarks that for a long term of years no attention was paid to the obligation to pay interest in advance each year, again overlooking the fact that there was no *obligation* to pay in advance, and overlooking the correllative and equally reprehensible neglect of the State for the same period to exact payment by suit in the way alone that it was entitled to exact payment. The Court speaks of the conditions in the contract wherein the parties agreed upon the modes by which it might be abrogated as only remedies, which the legislature has power to alter.

And the Court curiously misread the decisions of this Court in Wilson v. Standefer, 184 U. S., 399, and Waggoner v. Flack, 188 U. S., 595, which it took as its model and guidein holding the act of 1889 constitutional. In those cases the State of Texas, as here the State of California, had entered into certain contracts with citizens for the sale of public lands. At the time thecontracts were made the local law prescribed a procedure for declaring the existence of a forfeiture under them, should forfeiture accrue. Subsequently a later act of legislature displaced this law and provided a different way of declaring such forfeiture. This later law was challenged as impairing the obligations of the contracts, but this Court held that neither law was an element of the contract but only a procedure to declare and make known the termination of the contract after it had terminated. The Texas and the California contracts are as wide apart as the poles. The question, of course, is upon the terms of the contracts, and the incidental similarity that in both instances they were contracts between the State and individuals for the sale of public lands is of no consequence. The Texas contracts in their structure and terms bear no likeness whatever to the Brackett contract. By them Texas

agreed to sell lands upon certain payments to be made, at statedtimes, but the contracts by their terms ceased absolutely if the payment were not made on the due date. No right of any kind survived the nonpayment. There was no foreclosure or other like procedure provided for, no right of redemption—just a simple common law contract for conveyance if payment made as contracted, and for termination of the contract upon default in payment. The State had provided, in the first instance, for a suit to ascertain and declare the fact of termination, with a right to the contract holder to show that he had, in fact, made payment within time, but without giving him any other defense. The later law dispensed with this suit and in lieu of it ordered the State land officer to enter up the fact of forfeiture upon his record, allowing the contract holder six months thereafter in which to come in and by suit establish the fact, if he could, that he had paid, but shutting him up to that showing. Of course, and for obvious enough reasons, those laws were no elements of the contract, and in no wise were prejudicial to any right under the contract. They altered nor diminished the contract rights in no way, and the decisions of this Court upholding the later and substitute law casts not the least shadow upon the case at bar.

Brackett paid to the State of California a part of thepurchase price, and obtained a contract for the conveyance of title upon payment of the balance. In evidence of his contract and his rights under it he received what is called a Certificate of Purchase, and this paper by express statute is made "prima facie evidence of title" (Political Code of California, §3514). Moreover, Brackett's Certificate of Purchase or contract

is a muniment of title, and by reason of it he held, indubitably, such an interest in or equitable title to the land as is property.

Soulard v. United States, 4 Pet., 511;
Telfener v. Russ, 145 U. S., 532;
Teschmacher v. Thompson, 18 Cal., 24.

The act of 1889, just by its own inherent force as a legislative enactment, and without in any way affording Brackett notice or opportunity to be heard, undertook to divest Brackett of his property in the land. It is just an unvarnished legislative declaration that Brackett's title is thereby annulled, and curiously enough the annulment is not for the benefit of the State, the State by this legislation does not cancel Brackett's contract to restore the land to itself, but the declared purpose of the act is to take the land away from Brackett in order to pass it on to Phillips.

The act of 1889 is a very obvious piece of special legislation. A mere reading of it engenders the suspicion that it was drafted with care to miss most cases and hit only a particular few, perhaps only the case at bar. Enacted in 1889, it is carefully confined to contracts made prior to a day in 1872, for no intrinsic reason that can be discovered, and when like contracts made after that date stand, on their facts and merits, in precisely the same classification. It applies only to such contracts where five years in arrears of interest payments when like contracts in arrears for a less term are equally in default. And finally and most noticeably it is made to apply, not to *all* cases even of contracts made before 1872 and five years in arrears, but only to such within those bounds as are for lands

which the State has, erroneously and against its own laws, contracted to others. Such an arbitrary and wholly unjustified classification directed against Brackett is a denial as to him of the equal protection of the law.

Gulf, Colo., and Santa Fe Ry. Co. v. Ellis, 165 U. S., 150.

Respectfully submitted,

FRED W. LAKE,
Amicus Curiae, in pro. per.

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In the Supreme Court
OF THE
United States

October Term, 1917

No. 265

B. M. AIKINS,
Plaintiff in Error,

vs.

W. S. KINGSBURY, as Register of the State Land Office,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This writ of error challenges the correctness of the final decision of the Supreme Court of the State of California denying the plaintiff in error, who was the original plaintiff at the commencement of the suit, any of the relief demanded by him in his complaint. That decision reversed a decision in his favor, rendered by an intermediate court of ap-

peal which had affirmed the final judgment of the State Superior Court which was also in his favor. The original decree, thus reversed, was rendered by the Hon. James M. Seawell, and it sustained the contention of the plaintiff, now plaintiff in error, that an act of the legislature of the State of California, was unconstitutional, because in conflict with the Federal Constitution. That also was the opinion of the intermediate court of appeals. We are thus explicit, at this time, in order to show that the foundation of the plaintiff's claim, at the beginning of the suit, was, because of the alleged conflict between a state statute and the Federal Constitution—a claim sustained by two state courts —so that the final reversal by the State Supreme Court was a denial, necessarily, of this claim.[1]

The facts of this case, and the question of law involved, appear from the following statement: In 1869, the laws of California, dealing with the purchase of state lands, were all contained in Chap. CCCCXV, and entitled "An act to provide for the management and sale of the lands belonging to the state," approved March 28, 1868. This act consisted of 72 sections, and it was divided into four parts, entitled, respectively, as follows: "Part I., General Powers and Duties of Officers." "Part II., Swamp and Overflowed, Salt Marsh and Tide Lands."

(1) Since this writ of error was granted Judge Seawell has died. Though a *nisi prius* judge, he was regarded by both bench and bar as the ablest constitutional authority in California; and his opinion that a statte statute was void because of the controlling authority of the Federal Constitution is entitled to great weight. The decision of the Court of Appeal, in concurrence with Judge Seawell, is quoted by us in full, post appendix.

"Part III., School Lands," and "Part IV., Miscellaneous Provisions." The entire act is quoted in extenso on pages 507 et seq. of Statutes of Cal., of 1867-8; but the provisions of the act, material here to be considered, are quoted in full, following:

"*Section* 1. For the purpose of managing and selling any lands, the title of which is now or may hereafter be vested in the State by reason of any grant from the United States, or to which the state is or may be entitled by virtue of her sovereignty, an office shall be established at the seat of government, to be designated and known as the State Land Office of the State of California, the chief officer of which shall be known and designated by the title of Register of the State Land Office, and his duties shall be such as may be prescribed by law.

Section 4. *Whenever the Register shall receive from the County Treasurer of the proper county a statement showing that any applicant for any State lands has made the first payment of principal and interest, as hereinafter provided, he shall issue to the persons entitled thereto a certificate of purchase, which shall show the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest shall be computed, the amount paid and the amount remaining unpaid; which certificate shall be received in any court of justice in this State as prima facie evidence of title.*

Section 6. *The Register of the State Land Office shall, on or before the first day of May of each year, prepare and forward to the District Attorney of each county a statement embracing all the lands in the county upon which payments have not been made according to law.* Said statement shall show the name of the purchaser, the number and date of the sur-

vey or location and of the certificate of purchase, the amount paid, the amount unpaid and the amount then due; *provided,* that no lands within any reclamation district shall be embraced in said statement after the receipt by the Register of the certificate of the Board of Supervisors, as provided in section forty of this Act, that works of reclamation have been commenced.

Section 23. Whenever any survey or location of any state lands shall have been made or approved by the Surveyor-General, the purchaser shall, within fifty days from the date of said approval or location, present his copy of the same to the County Treasurer, who shall thereupon receive the amount, whether in full or in part, so provided by law, and the fee for the certificate of purchase, indorsing his receipt therefor upon the back of the said certificate of location or survey, which shall then be returned to the purchaser. All subsequent payments, whether for the balance of the principal or of the interest thereon, shall be paid to the County Treasurer in like manner, who shall indorse the same upon the back of the certificate of purchase. The Treasurer shall also direct the purchaser to take said certificate of location, or purchase, or survey, so indorsed, to the Auditor, who shall charge the amount named therein to the account of the Treasurer, and make his check upon the indorsed receipt so charged.

Section 51. *The unsold portion of the five hundred thousand acres granted to the State for school purposes, the unsold portion of the seventy-two sections granted to the state for a seminary of learning, the unsold portion of the ten sections granted to the state for the erection of public buildings, the sixteenth and thirty-sixth sections granted for school purposes, and lands selected in lieu thereof, shall*

be sold at the rate of one dollar and twenty-five cents per acre, in gold coin, payable twenty per cent. of the principal within fifty days from the date of the certificate of location issued to the purchaser by the Surveyor-General; the balance, bearing interest at the rate of ten per cent. per annum, in advance, shall be due and payable within one year after the passage of any Act of the Legislature requiring requiring such payment, or before, if desired by the purchaser.

Section 52. Whenever any resident of this State desires to purchase any portion, not less than the smallest legal subdivision of a sixteenth or thirty-sixth section of any township in the State, which has been surveyed by authority of the United States, he or she shall make an affidavit, before any officer authorized to administer oaths, that he or she is a citizen of the United States (or, if a foreigner, that he has filed his intention of becoming a citizen), a resident of the State, of lawful age; that he or she desires to purchase said lands (giving a description thereof by legal subdivision) under the provisions of this Act; that he or she has not entered any portion of any sixteenth or thirty-sixth section which, together with that now sought to be purchased, shall exceed three hundred and twenty acres; that there is no occupation, of said lands adverse to any that he or she may have; or, if there shall be adverse occupation, then he or she shall state that the township has been sectionized and subject to preemption three months or over; and that said adverse occupant (giving his or her name) has been in such occupation for more than sixty days; and if the applicant be a female, she shall state that she is entitled to purchase and hold real estate in her own name under the laws of the State; which application shall be forwarded to the Surveyor-General of the State.

Section 63. In the event of any of the lands sold by the State proving to be within the boundaries of a grant, or otherwise not the property of the State, the holder or assignee of the certificate of purchase or patent shall be entitled to receive in exchange therefor a certificate from the Register of the State Land Office that such amount has been paid. This certificate shall specify the kind or class of land upon which the said amount was paid, and the locator may present and the County Treasurer and State Treasurer shall receive and said certificate as payment for its amount, either principal or interest, upon any lands of the same class which the same purchaser or assigns may afterwards desire to locate or may already have located.

Section 64. *Whenever a purchaser of any State land upon a credit desires to abandon the location or entry made by him, he shall do so by acknowledgment and reconveyance of his title to the State, and shall surrender the certificate of purchase, or, if the same has been lost, send to the Register an affidavit of the fact.*

Section 65. *Upon receipt of the delinquent list aforesaid from the Register of the State Land Office, as provided in section six, the District Attorney shall add thereto a notice that if the said amount due shall not be paid in fifty days after the date thereof, he will commence suit to foreclose the* INTEREST OF SAID PURCHASERS *in the said lands, and shall publish said list, with said notice appended, for four consecutive weeks immediately following the date of the notice; or if there shall be no newspaper published in said county, then he shall post copies of the same in at least five public places in the county. After the expiration of the fifty days, the District Attorney shall, in the name of The People of the State of California, commence an action in the District Court* AGAINST ALL PURCHASERS OR HOLDERS *of certificates of purchase*

who have not either paid said amount so due, together with the cost of publication, or surrendered the title to the State, as provided in the preceding section, to obtain a decree of foreclosure of the interest of the purchaser or holder of the certificate of purchase in the land and to annul said certificate of purchase. If the name of the holder of the certificate be not known, he may be sued under a fictitious name, and service of the summons may be had by publication in some newspaper published in the county for four weeks; or if no newspaper be published in the county, then by posting one copy of the summons for four weeks at the Court-house door of the county, and two copies in public places in the township where the land is situated.

Section 66. When a decree shall have been obtained, and within twenty days after the entering up of said decree, the District Attorney shall cause a certified copy of said decree to be filed in the office of the Register of the State Land Office, and another certified copy in the Recorder's office of the county in which the land is situate. The holder of the certificate of purchase may, at any time before the expiration of the twenty days provided for filing a certified copy of the decree in the office of the Register of the State Land Office and Recorder of the county, pay to the Sheriff, for the State, the amount due the State and the costs of suit that have accrued up to time of payment; whereupon the District Attorney shall dismiss the suit, and the purchaser or holder of the certificate of purchase shall be restored to his rights in the land, the same as if no neglect or forfeiture had been made. The District Attorney shall be entitled to receive ten dollars for each suit brought.

Section 67. After the decree of the Court foreclosing the interest of the purchaser or the

holder of the certificate has been entered, and the certified copies filed in the offices of the Recorder of the county and the State Land Register, the land shall be subject to entry and sale, and a certificate of purchase may be issued, in the same manner as if the land had never been entered and sold. Upon the obtaining of a decree foreclosing the interest of the purchaser or of his assigns in the land, and annulling the certificate of purchase, the expenses and cost shall be taxed by the Court against the defendant, and execution shall issue thereon; but if there be not sufficient property belonging to defendant found to satisfy the same, and the execution returned not satisfied, then the same shall be paid from the twenty per cent. of the principal of the purchase money, or from the interest paid by the purchaser at the time of the original location and entry of the land; *provided,* that the total cost shall not be taxed at a sum in any case to exceed thirty-two dollars; *provided further* that the cost of the publication required in section sixty-five shall not be a part of the thirty-two dollars; but the same shall, if it cannot be collected of the purchaser, if the lands described be swamp and overflowed, salt marsh or tide lands, be paid out of the Swamp Land Fund, on the order of the Board of Supervisors; or if any class of school lands, then out of the General Fund of the State.

Section 68. *Any person having a good and sufficient conveyance to the whole or any portion of the lands described in any certificate of purchase, to annul which suit shall have been commenced as above provided, but to whom the certificate has been surrendered, shall have a right to defend said action; and if he or she shall show, to the satisfaction of the Court, that he or she is entitled to any portion of the lands described, and if the holder of said certifi-*

cate does not come forward and pay the amount due, then the Court shall order the certificate annulled, and a new one to issue to the defendant by the payment in open Court, by the defendant, of the amount due the State upon the whole tract; and the said defendant shall thereupon be entitled to two certified copies of said decree, one of which he shall file in the County Recorder's office, and the other with the Register of the State Land Office.

Section 69. Certificates of purchase and all rights acquired thereby shall be subject to sale and transfer, by deed or assignment, executed and acknowledged before any officer authorized by law to take acknowledgment of deeds, or before said Register; but all such sales or transfers shall, when recorded by the County Recorder, be reported by him to the Register, to be entered in the books of his office; and the said Recorder shall be entitled to receive from the purchaser or transferee, for so reporting the same, a fee of fifty cents in addition to that already allowed for recording."

From a mere reading of these statutes, it will be seen, that the following are the substantive provisions of the law, which for convenience we subdivide alphabetically:

(a) The price of the land was fixed, $1.25 an acre.

(b) At least 20% of the principal had to be paid within fifty (50) days from the date of the approval of the application, when for the first time a certificate of purchase issued which evidenced

then and not till then, the contract between the purchaser and the state.[2]

(c) The balance of the purchase price was to bear interest at 7% per annum, and might be called "within one year after the passage of any act of the legislature requiring such payment, or before, if desired by the purchaser."

(d) Upon failure to make the required payments—after the certificate of purchase had been issued—the district attorney of the county where the land was situated was required to commence a suit to foreclose the title of the purchaser in the land.[3]

(e) After judgment of foreclosure has been entered in the suit, the district attorney must within twenty (20) days after its entry file certified copies of the judgment in the office of the register and of the county recorder, respectively.[4]

(2) The certificate shows the following matters:
1. Class of land.
2. Number of acres.
3. Price paid per acre.
4. Date of payment.
5. Date from which interest is to be computed.
6. Amount paid.
7. The amount remaining unpaid.

It is made *prima facie* evidence of title (sec. 4, supra, and cf. secs. 68, 69, supra). Of course, prior to approval and the issue of a certificate of purchase, the right of a prospective purchaser is inchoate, and could be destroyed utterly by a mere fiat of the state. But after the issue of a certificate of purchase, a contract subsists between the state and the purchaser, its terms, of course, being defined in the statute. It will not be disputed by our opponents, that when a state makes a contract with a private individual, it occupies no better position than and is subject to the same rules, benefits and burdens as are private individuals in such cases.

(3) It should be borne in mind that the purchaser, after the certificate of purchase is issued, is an owner of the land. The statute says the certificate is evidence of title; and there cannot in law be title without ownership (see secs. 4, 68 and 69).

(4) The recording of the certificates is important because until it has been done, the land is not open to resale (sec. 67, supra).

(f) Lastly the contract established a period of time within which the owner of the certificate could exercise his equity of redemption, as in case of mortgages in California. This right was an absolute one; and it is best stated in the words of the statute itself:

> "*Section* 66. When a decree shall have been obtained, and within twenty days after the entering up of said decree, the District Attorney shall cause a certified copy of said decree to be filed in the office of the Register of the State Land Office, and another certified copy in the Recorder's office of the County in which the land is situate. The holder of the certificate of purchase may, at any time before the expiration of the twenty days provided for filing a certified copy of the decree in the office of the Register of the State Land Office and Recorder of the county, pay to the Sheriff, for the State, the amount due the State and the costs of suit that have accrued up to the time of payment; whereupon the District Attorney shall dismiss the suit, and the purchaser or holder of the certificate of purchase shall be restored to his rights in the land, the same as if no neglect or forfeiture had been made. The District Attorney shall be entitled to receive ten dollars for each suit brought."

With this the condition of the law, it appears that the State of California sold 320 acres of land, in Kern Co., Cal., on June 3, 1869, to Charles A. B. Brackett. The application of Brackett was approved, and within fifty (50) days thereafter, as required by the statute, he made payment of 20% of the purchase price, whereupon there was issued

to him the proper certificate of purchase, reading in part as follows (Tr. p. 13, fol. 30):

> "It appearing from the Certificate of the County Treasurer, bearing date June 3d, A. D. 1869, that Charles A. B. Brackett has paid to the State of California the sum of one hundred and two and 20/100 ($102.20/100) Dollars, being twenty per cent. of the purchase money and first interest on the balance, in advance to Jan'y 1st, 1870, for 320 acres of State Land, described as follows, in location No. 776 Surveyed Lands Visalia Land District, N½ of Section 36 in Township No. 28 South, Range No. 21 East, Mount Diablo Meridian."

and which certified the following facts, in the words and figures as follows, to wit:

> "Now, therefore, be it known, that the said Charles A. B. Brackett having made payment of said twenty per cent. and first year's interest, for the above described Tract of Land, under the provisions of an Act entitled 'An Act to provide for the sale of certain Lands belonging to the State,' approved March 28th, 1868, is the Purchaser of the same; and after having in all other respects complied with the provisions of said Act, and on surrendering this Certificate to the State of California, the said Charles A. B. Brackett shall be entitled to receive a patent for the same.
>
> Balance of purchase money due 320.00/100 dollars.
>
> Interest to be computed from April 20th, 1869.
>
> Act of March 28th, 1868. Interest—Ten Per Cent. per Annum in Advance."

We reiterate, at this time, that under the law Brackett was not required to pay the state the balance of the purchase money until, either,

(a) He elected to do so;

(b) The state passed an act requiring its payment, in which event he was given one year to pay; (and no such act was ever passed).

(c) Judgment of foreclosure had been entered against him. And then he had twenty (20) days, after this judgment had been entered, as already mentioned, within which to pay all the principal and interest due the state, under his right to exercise the specified equity of redemption.

On October 26, 1911, the plaintiff in error purchased the certificate of Brackett, so far as it related to a portion of the land owned by him; and thereafter paid the state the balance due for the tract of land in full, which is required to be done before a patent can issue. Thereafter, a tender of all the statutory fees to the defendant in error, who is the person charged by law with the preparation of the patent, having been made, a demand for a patent was presented and refused. This refusal was based upon the ground that the Brackett certificate had been cancelled, and was no longer in force. This claim was founded upon two contentions:

(a) That the Brackett certificate had been foreclosed upon, in the proper court of justice, and the equity of redemption extinguished, as provided in the statutes we have already quoted. See secs. 65-66, quoted supra.

This contention is not involved here, for the reason that the trial court held the alleged judgment

to be void upon its face (Tr. p. 14, fol. 31, finding VII); its conclusion in that respect was affirmed by the District Court of Appeal; and the correctness of that conclusion was assumed in the Supreme Court.

(b) That the Brackett certificate was annulled and cancelled by a subsequent act of the legislature, which, *ex propria vigore,* killed it, and robbed it of its legal efficacy, without a resort being made to any foreclosure proceeding to effect the extinguishment of the equity of redemption, as required by the statutes in force at the time of the purchase.

The act thus referred to reads as follows:

> "1. Whenever application has been made to purchase land from this state, and payment only in part has been made to the treasurer of the proper county for the same, and a certificate of purchase has been issued to the applicant prior to the twenty-seventh day of March, eighteen hundred and seventy-two, and whenever such applicant, his assignee or assignees, shall have failed for five years to pay to the state the arrears of principal or of interest due to the state for said land, and the state shall at any time heretofore have issued a certificate of purchase for the same land, or any part thereof, to a subsequent purchaser, then, unless the holder or holders of such prior certificate shall pay the entire residue of the interest remaining unpaid for such purchase within six months from and after the passage of this act, such holder or holders shall be deemed to have lost all right to the land described in said certificate, or to complete the purchase of such land, and all moneys

heretofore paid to the State of California on such purchase shall be deemed and taken to be forfeited to the state."

California Statutes, 1889, page 428.

This act was held in the trial court, Seawell, J., to be unconstitutional, under the Federal Constitution, upon three grounds:

(a) It was an attempt by subsequent legislation to change or effect the right to exercise the equity of redemption granted by the statute at the time the contract was made in pursuance of it, in violation of this court's decision in Barnitz v. Beverly, 163 U. S. 118.

(b) It impaired the obligation of the contract previously entered into between the state and Brackett; and

(c) As the statute made the certificate of purchase evidence of title and fixed ownership in Brackett, the statute divesting Brackett of title, *only* when some one else claimd the land, owned by Brackett, was a legislative transfer of title from out of Brackett to that person.

The views of Judge Seawell were, as already stated, approved by the intermediate court of appeals, in an opinion by Richards, J., quoted in the appendix, from which, at this time, to show the view of the court, we extract the following:

"2. The next contention of the appellant is that the rights of Charles A. B. Brackett, and hence of his assignee were forfeited by the state under the terms of the statute of 1889,

the substance of which is above set forth. The difficulty with this contention consists in the fact that the certificate of purchase of this land, issued by the state of Charles A. B. Brackett, constituted a contract, the whole terms of which were embodied in the statute which provided for such purchase, and in which the rights of the respective parties to such contract, in the event of any default on the part of the purchaser, were expressly set forth, and these did not embrace any right on the part of the state to put the purchaser in default as to the payment of the balance of the principal sum due upon the purchase price of the property, save by and after a legislative act demanding such payment; nor to enforce any penalty against the purchaser for his default in the payment of his annual interest except through the medium of a foreclosure suit against him after such default, *and in which he could exercise the right of redemption expressly given by that statute.* The state never passed a legislative act demanding payment of the principal due on this purchase; and, as we have seen, it failed to properly institute or prosecute its foreclosure suit. These were the only two forms of remedy which the state had reserved to itself under this contract with Brackett; and it must be held to be clear violation of the obligation of this contract to undertake to work a forfeiture of the interest of the purchaser or to impair his right to redemption in the manner provided by the act of 1889. (Welsh v. Cross, 146 Cal. 621, and cases cited.)"

The conclusion was reversed by the State Supreme Court, upon the authority of the two following decisions of this court:

Wilson v. Standefer, 184 U. S. 399;

Waggoner v. Flack, 188 U. S. 595.

It is our contention, with all due respect to the State Supreme Court, that it completely misapprehended the two authorities cited, which, so far from sustaining its position, are authorities really to the contrary; and in this respect we think the opinion of the District Court of Appeal correctly apprehends these decisions when it said:

> "The cases of Fristie v. Blum, 92 Texas 76; Wilson v. Standefer, 184 U. S. 399 and Waggoner v. Flack, 52 S. W. 584, chiefly relied upon by counsel for appellant in support of their views upon this point, will all be found to be predicated upon the different working of the statutes of Texas, from which state they went up; and when closely considered will not be found to be out of accord with our conclusions as to the ineffectiveness of the California statute of 1889 in aid of the appellant's case."

As the decision of the State Supreme Court not alone reversed the two decisions in our favor, inferior to it, but directed that the proceeding itself be dismissed, the only alternative left was to appeal to the judgment of this court to decide the question of their conflicting views, since the final decision sustains the state law as against the Federal Constitution; and accordingly the case is brought here.

Of course, the fact that the action seeks a writ of mandamus against a state official, in no way deprives this court of jurisdiction in a proper case.

See

Hartman v. Greenhow, 102 U. S. 672;
American Exp. Co. v Maymard, 177 U. S. 404;
McPherson v. Blacker, 146 U. S. 1, 23-4.

Assignment of Errors.

And now comes B. M. Aikins, plaintiff in error herein, and makes and files this, his assignment of errors herein:

I.

The Supreme Court of the State of California erred in reversing the judgment and order denying a new trial herein and in directing that final judgment be entered in favor of the defendant.

II.

The Supreme Court of the State of California erred in holding in its opinion and decision herein, that the equity of redemption or right to redeem within one year from and after a final decree foreclosing the predecessor in interest of plaintiff in error herein, *out of* any interest in the certificate of purchase in suit, had been extinguished by the act of the legislature of the State of California, referred to in its opinion herein; and the said act of legislature referred to in said opinion, held to extinguish such equity of redemption or right to redeem, impaired the obligation of a contract between

the plaintiff in error and the State of California, in violation of section 10 of article I of the Constitution of the United States.

III.

The Supreme Court of the State of California erred in holding that the aforesaid act of 1889 forfeited the rights of the predecessor of the plaintiff in error herein under the certificate of purchase, referred to in said opinion, and such act, when given the construction to it as is given by the Supreme Court in its opinion and decision herein, deprived the plaintiff in error of his property without due pocess of law, in violation of section 1 of article XIV, of the 14th Amendment of the Constitution of the United States.

IV.

The ruling and holding of the Supreme Court of the State of California, in its opinion and decision herein, that the act of 1889 cut off, extinguished and forfeited all rights of the plaintiff in error herein, in and to the certificate of purchase in question, was and is error, because such act, so construed in said opinion, deprived the plaintiff in error herein of his property in said certificate of purchase without due process of law in violation of section 1, article XIV of the 14th Amendment of the Constitution of the United States.

V.

The ruling and holding of the Supreme Court of the State of California herein, that the act of 1889 extinguished, cut off and forfeited all the rights of the plaintiff in error herein and to the certificate of purchase in question, without any judicial proceeding being instituted to accomplish that purpose, or that said act cut off and extinguished the right of plaintiff in error to said certificate or his right of equity of redemption therein, was and is error, because said act, as so construed by said Supreme Court of the State of California, impaired the obligation of the contract subsisting between the plaintiff in error and the State of California at the time said certificate of purchase was issued, in violation of section 10, article I of the Constitution of the United States.

VI.

The ruling and holding of the Supreme Court of the State of California herein that the cause of action in favor of plaintiff in error herein for the issuance of a patent, based upon his certificate of purchase, which had been paid up in full, at the time when the same was in full force and effect and when the equity of redemption therein had not been extinguished, cut off or forfeited by any judicial proceeding, was barred by any Statute of Limitations herein, was and is error.

VII.

The ruling and holding of the Supreme Court of the State of California herein that the cause of action in favor of plaintiff in error herein for the issuance of a patent, based upon his certificate of purchase, which had been paid up in full at the time when the same was in full force and effect and when the equity of redemption therein had not been extinguished, cut off or forfeited by any judicial proceeding, was barred by laches, was and is error.

VIII.

It appearing from the opinion and decision of said Supreme Court of the State of California herein that plaintiff in error herein was the owner of a certificate of purchase to certain lands, issued by the State of California, upon which payment had been made in full in the year 1911, that no judicial proceeding had ever been instituted at any time under which pursuant to any judgment to any court the property right of the plaintiff in error or the predecessor of the plaintiff in error had been cut off, extinguished or forfeited, or whereby the equity of redemption, given and granted to the plaintiff in error and to his predecessor by the statute at the time the said certificate of purchase was issued, to-wit, a right to redeem at any time within twenty days after the entry of a final judgment foreclosing said equity of redemption and within one year thereafter, and it further appearing that the plaintiff in

error had demanded the issuance of a patent from the proper office, appellant herein, after the payment in full under the circumstance set forth,—the ruling and holding of the Supreme Court of the State of California herein that the act of 1889, referred to in said opinion, cut off, extinguished and forfeited all property rights of the plaintiff in error herein, or his predecessor, in and to said certificate of purchase and in and to his equity of redemption therein,—was and is error, for the reason that such act, as so construed, deprived plaintiff in error of his property rights in said certificate of purchase without due process of law, and further, the cutting off and extinguishing the equity of redemption, vested in plaintiff in error, impaired the obligation of the contract subsisting between the plaintiff in error, his predecessor, and the State of California; that such right of redemption should exist until extinguished by the judgment of a court of competent jurisdiction, and for a specified time thereafter, and the ruling and holding of the Supreme Court of the State of California in the premises, that such equity of redemption or the right to redeem, when the same had not been extinguished, cut off or forfeited by any judgment of any court, had become barred by laches or limitation, impaired the obligation of the contract with respect to such right of redemption, theretofore subsisting between the plaintiff in error and the State of California.

IX.

The only effect of the decision of the Supreme Court of the State of California in this case is to hold that the equity of redemption, vested in plaintiff in error by law at the time the certificate of purchase was issued by the state herein, and now owned by the plaintiff in error herein, to-wit, a right to redeem within twenty days after a final judgment foreclosing upon said certificate, and within one year thereafter, had been shortened, cut off, extinguished and forfeited by the act of 1889, and such act, as so construed, impaired the obligation of the contract with respect to such equity of redemption, existing between the plaintiff in error herein and the State of California in violation of section 10 of article I of the Constitution of the United States.

Wherefore, plaintiff in error prays that the judgment and decision of the said Supreme Court of the State of California be reversed and that the judgment and order of said Superior Court, originally entered herein, be affirmed, and that the cause be remanded to the Supreme Court of the State of California, with directions to affirm the judgment and order of said Superior Court.

Brief of the Argument.

It has not been possible to present a statement of the case, without quoting somewhat fully the statutes of the state, applicable to the discussion; otherwise

we could not comply with the rule of this court, directing us (rule 21, subdivision 2) to show "succinctly the questions involved and the manner in which they are raised". And from this it is plainly apparent that the only question involved is, as to the validity of the state statute, sustained in the State Supreme Court. If it were not for the adverse decision of that court upon the point, we should assert the invalidity of that statute was so clear as not to require argument. That decision, however, requires us to point out wherein its unconstitutionality consists; and we follow the order of grounds sustained by Judge Seawell.

I.

THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT NOT ALONE IMPAIRS, BUT IT UTTERLY DESTROYS THE EQUITY OF REDEMPTION ORIGINALLY GRANTED TO BRACKETT, AT THE TIME THE PURCHASE WAS MADE.

The reasoning pursued by the State Supreme Court is best shown by the following quotations (Tr. p. 47, fol. 107):

> "It is to be noted that the procedure outlined in sections 65 and 66 of the act of 1868 was not expressly made a part of the contract. We have set out the former section in substance above. The latter gave the holder of a certificate of purchase 20 days after a decree of forfeiture and before copies of such decree had been filed with the register of the land office and the recorder of the county, during which time he might redeem by paying to the

> sheriff of the county in which the property was situated the amount due to the state. But we do not think the method of terminating the rights of a defaulting purchaser under the act of 1868 was exclusive. It was merely a method of declaring a forfeiture. If the petitioner was in default, he may not complain because the state has established a method of declaring a forfeiture different from the judicial procedure authorized by the statute at the time of his purchase. At the most, he may only complain if the later procedure imposes upon him more onerous conditions than the former. It is sometimes difficult to draw the line between legitimate alterations of a remedy and provisions which impair a right (McCauley v. Brooks, 16 Cal. 31), but we find no such difficulty here. The provisions of section 66 of the law of 1868 with respect to the entry of judgment and the filing of certified copies thereof and the period of redemption are all but matters of procedure which a purchaser is not entitled to enjoy without change provided the substituted procedure was not more onerous than the earlier statute."

From this extract it appears that the court holds that the law in force at the time the contract was made is not a part of the contract; it was not "expressly made a part of the contract", says the court; and that the right of redemption in a foreclosure proceeding is not a property right protected by the Federal Constitution, for the opinion says distinctly that "the period of redemption" after judgment is but a "matter of procedure which a purchaser is not entitled to enjoy without change".

The answer to this argument is plain. It is true that, as the court later points out in its opinion, while the laws in force at the time a contract is made are a part of the contract, which cannot be changed by subsequent legislation, this rule does not apply to remedies, provided some equivalent remedy is given, nevertheless the right to exercise an equity of redemption is not a part of the remedy at all; it is substantive right. And it has been distinctly so held by this court.

Speaking of an attempt to change a granted right to exercise the equity of redemption, this court has said:

> "It seems impossible to resist the conclusion that such a change in the law is not merely the substitution of one remedy for another, *but is* a *substantive impairment* of the *rights* of the *mortgagee* as *expressed in the contract.*"
>
> Barnitz v. Beverly, 163 U. S. 118.

The Supreme Court of California concedes that "when a state enters into a contract as a vendor of land it is subject to the same rules that govern private parties to such agreements",[5] and we are ready to concede that remedies for the enforcement of rights breached may be changed by subsequent legislation. But the right to exercise the equity of redemption is not a remedy, but a right; an integral part of the contract at the time it is made; and it can neither be shortened nor length-

(5) That this is a correct statement of the law is not open to dispute. Prov. Bank v. Billings, 4 Peters 514.

ened, impaired nor extinguished, by subsequent legislation.

Barnitz v. Beverly, supra.

The Supreme Court of California prior to this decision was itself explicit on this point, and in full accord with the decisions of this court.

> "In the late case of Barnitz v. Beverly, 163 U. S. 118, the principle is fully discussed, and it is held that a statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. The court, after citing many cases, said: 'It seems impossible to resist the conclusion that such a change in the law is not merely the substitution of one remedy for another, *but is a substantial impairment of the rights of the mortgagee as expressed in the contract.*'
>
> *This court* (the Supreme Court of California) has followed the case of Barnitz v. Beverly, 163 U. S. 118, in the late cases of Savings Bank of San Diego v. Barrett, 126 Cal. 417; Haynes v. Tredway, 133 Cal. 400; Malone v. Roy, 134 Cal. 344."
>
> Welsh v. Cross, 146 Cal. 628.

In the concurring opinion of Mr. Justice Shaw in the case, he says:

> "The case cannot be distinguished in principle from Bronson v. Kinzie, 1 How. 311; Howard v. Bugbee, 24 How. 461, and Barnitz v. Beverly, 163 U. S. 118, *which declare laws allowing or increasing the period of redemption invalid as to pre-existing mortgages.*"
>
> Welsh v. Cross, 146 Cal. 628.

It may be of interest to trace the history of this doctrine in California. It was first announced in the early case of People v. San Francisco, 4 Cal. 127, though the correctness of the decision was doubted in Hart v. Barnett, 15 Cal. 587, on account of the able dissenting opinion of Mr. Justice Heydenfeldt. In Moore v. Martin, 38 Cal. 428, and Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 570, People v. San Francisco was *overruled.*

In Welsh v. Cross, 146 Cal. 628, however, from which we have quoted, these decisions themselves were in turn overruled, and the original doctrine of Pople v. San Francisco affirmed, it being said, referring to these two cases:

> "Without discussing the two latter cases, it is sufficient to say that we think the three cases following Barnitz v. Beverly, 163 U. S. 118, are in accord with the earlier cases, and practically *overrule* the cases cited from 15 to 38 Cal."

The author of a note to Barnitz v. Beverly, in 54 Am. St. Rep. 808, notes that

> "the constitutionality of such statutes (referring to a statute passed subsequently changing the right of redemption) was affirmed in Moore v. Martin, 38 Cal. 428; Beverly v. Barnitz, 55 Kan. 466;[6] State v. Gilliam, 18 Mont. 94, and denied in People v. San Francisco, 4 Cal. 154; Watkins v. Glenn, 55 Kan. 417; Wilder v. Campbell, 4 Idaho 695; but the decisions in denial made in California and Kansas were overruled by subsequent decision made in the same states. *It now appears, however, that*

(6) Beverly v. Barnitz, 55 Kan., was reversed by this Court in Barnitz v. Beverly, 163 U. S. 118.

the earlier decisions in both states were correct."

The state court, in Welsh v. Cross, *supra,* quotes the foregoing language with approval, saying that

> "After the decision in Barnitz v. Beverly a rehearing was granted by the Supreme Court of Montana [referring to 18 Mont. 94] and a judgment rendered in accordance therewith."

In

Belcher v. Chambers, 53 Cal. 643,

the State Supreme Court said:

> "When our judgment must depend upon a question which may be re-examined by the Supreme Court of the United States on writ of error, we will follow the rule of law laid down by that court."

This doctrine was affirmed in

San Benito County v. Southern Pacific Company, 77 Cal. 520;

United Land Association v. Knight, 85 Cal. 477;

and

United Land Association v. Pacific Improvement Co., 139 Cal. 376.[7]

Notwithstanding the decisions of this court upon this point, and the recognition by the State Supreme Court of the binding character of these decisions upon it, that court, as we have seen, held

(7) "The constitution, laws and treaties of the United States are as much a part of the laws of every state as its own local laws and constitution."

Fuller, C. J., in Blythe v. Hinckley, 173 U. S. 501, 508.

that the equity of redemption granted by a state statute was a part of the remedy, and was not a right, and that in consequence it would be affected or changed by subsequent legislation. This conclusion is manifestly erroneous.

We might rest this case here. But the incorrectness of the state decision can be illustrated by considering the two decisions of this court, upon which the state decision was made to turn:

Wilson v. Standefer, 184 U. S. 399;
Waggoner v. Flack, 188 U. S. 595.

These cases are cited to the point that the state had a right to rescind the contract of purchase[8] upon a breach of the contract by the purchaser; and in a proper case this, of course, may be conceded. But aside from the point that the right of redemption is a right and not a remedy,[9] which cannot be affected or changed by subsequent legislation, the very cases themselves state in explicit terms the principle upon which they were decided, to be that the subsequent act gave the purchaser (a) *the same rights,* and, (b) the privilege to exercise those rights, *in a court of justice,* which he had possessed under the former statute; for in the first case it is plainly said:

(8) It should be remembered here that the certificate of purchase, when issued, vested title, ownership, property, in the holder, Brackett (sec. 4 and sec. 69).

(9) How could the right of redemption, the right to redeem after default, and which could not exist until default, be a part of the remedy?

"But he had the same right and privilege under the act of March, 1897, which expressly provided that 'the purchaser of said land shall have the right at any time within six months after such indorsement of "Lands forfeited", to institute a suit in the District Court of Travis County, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive; and provided, that if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the 1st day of November next after such death.' *What would have been the rights of the parties, if time had not been given by the last statute within which to contest the forfeiture evidenced by the commissioners' indorsement, is a question not now necessary to be decided.*

It is apparent that the purchaser was NOT *deprived by the act of 1897* of the right *to be heard in a court of justice as to the fact of payment.* His position under that act was quite as favorable as under the prior act of 1879. It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, has always held that due process of law is afforded litigants *if they have an opportunity to be heard at any time before final judgment is entered.* Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Gallup v. Schmidt, 183 U. S. 307, ante 213, 22 Sup. Ct. Rep. 164; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925."

Moreover this case reiterates that the power of subsequent legislation is limited to effecting changes in the remedy; and we have seen that the equity of redemption after foreclosure is a part of the right, and no part of the remedy—so much so, that the period fixed by the statute cannot even be shortened or extended one day. So explicit was Mr. Justice Shiras on this point that he qualified even his reference to the remedy by the statement "nor can the existing remedy be so altered as to take away or impair any of the rights given by the contract as interpreted by existing law". And it is this case which is cited to support the contention here that a right to redeem from a foreclosure sale, within twenty (20) days after a decree of foreclosure is entered, may be utterly extinguished and abrogated, because not a part of an existing right but merely a matter of procedure!

So far we have only extracted from that part of the decision of this court quoted by the State Supreme Court, and relied upon as supporting its conclusion. When we come to consider the facts in those cases to which no reference has yet been made, the statutes there involved, and other extracts from those opinions, we understand why the District Court of Appeal concluded that these cases "will not be found to be out of accord with our conclusions as to the ineffectiveness of the California statute of 1889".

In the first case, a statute provided for a judicial foreclosure which, at the time of the issue of the

certificate, limited the defendant to the single defense, "whether he had paid the annual interest as provided for in his agreement", and restricted him to "a right to show that he had made the requisite payments, and thus defeat the forfeiture". *There was no right of redemption at all given him, under any circumstances.* The subsequent act provided for an entry of forfeiture upon the official records without any judicial proceeding, but gave to the applicant the period of six months after the forfeiture within which he might institute a suit to establish the fact of payment, which was the sole defense allowed to him by the former statute.

In other words, there was no right of redemption after foreclosure, as was granted here; and the change made was, that whereas under the first statute the state might foreclose, *in court,* under the subsequent statute the state might forfeit, and then the defendant was given the right to go to court and contest the forfeiture. The party was given the same right, *in court,* under the subsequent act, as he had *in court* under the former; and of course the act was valid. This court points out these conditions clearly, in the following language:

> "*It is apparent that the* purchaser was NOT *deprived by the act of 1897* of the right *to be heard in a court of justice as to the fact of payment.* His position under that act was quite as favorable as under the prior act of 1879. It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants *if they have an oppor-*

tunity to be heard at any time before final judgment is entered."

From this language, the conclusion is plain. The act there was sustained because the subsequent act gave to the delinquent party the same period of time to pay up as he had under the former act. The California act does not give any such equivalent period of time; it exacts a forfeiture immediately. The act was sustained in the case cited, because after the forfeiture was declared the right to contest in a court of justice was expressly given. No such right is given by the statute here; the right to appeal to a court of justice is taken completely away. And as no equity of redemption was granted by the first statute, in the case cited, the question of the power of the state to abrogate the exercise of that right, when once granted, was not involved or discussed.

From the second case we derive principles equally illuminating.

In Waggoner v. Flack, the certificate of purchase was issued under a statute claimed to be a part of the certificate, which provided that if the purchaser failed to make the payments due, it should *not* cause a forfeiture of his rights. Subsequently the legislature passed a statute which provided that if the payments were not made as agreed the land should be forfeited, with, however, a proviso that the purchaser had the right at any time within six months after the forfeiture to institute suit in the proper court against the commissioner

"for the purpose of contesting such forfeiture and setting aside the same upon the ground that the facts did not exist authorizing such forfeiture". If no such suit were instituted, the forfeiture was then to be regarded as absolute.

In the Federal Supreme Court it was claimed by the plaintiff in error that the statute in force at the time the certificate was issued, providing that no forfeiture could be had, could *not* be repealed, and that the legislature could not provide subsequently any method of forfeiting the title. This obvious erroneous contention was overruled by the Supreme Court, and in its decision it carefully points out the distinction which we maintain, and said:

> "We cannot discern the difference in principle between this case and that of Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384, which involved a portion of this same legislation. In that case the lands were purchased under the act of 1879, which provided (Sec. 12) for a forfeiture after judicial inquiry determining the failure of the purchaser to pay the annual installments of interest as they became due. Subsequently the act of 1897, already mentioned, was passed, and that act, it is seen, authorized the commissioner, when any portion of the interest due by the purchaser had not been paid, to declare a forfeiture of the purchase without judicial aid, and it gave to his action the effect of putting an end to the contract. It was under the act of 1897 that the forfeiture was declared in that case. There, as here, it was contended that the act of 1897 violated the contract between the parties. It was urged that as the act of 1879 provided a remedy by a resort to judicial pro-

ceedings for the purpose of enforcing a forfeiture, that such remedy was a part of the contract, and that the act of 1897, which provided for a forfeiture of the lands without judicial action, was a violation of the contract, and therefore void. This court held that the stipulation in the 12th section of the act of 1879, providing for a judicial forfeiture, did not amount in legal contemplation to a promise by the state that the only remedy which might thereafter be resorted to by it was the one therein provided for. *The court recognized the plain distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation, and it held that the remedy might be modified and enlarged without impairing the obligation.*

It is to be noted that the act of 1897 does not take away from the purchaser the right to be heard in a court of justice upon the question whether he, in fact, is in default in his payments of the obligations give by him for the land which he purchased. The act of 1897 *grants the purchaser six months* after the land commissioner has endorsed on the purchaser's obligation for payment for the land, the words 'Lands forfeited', *within which the purchaser may institute suit in Texas,* against the commissioner for the purpose of contesting the forfeiture and setting aside the same, upon the ground that the facts do not exist authorizing such forfeiture."

Both of these cases, it will be observed, rest upon the distinction that the remedy (and the right of redemption is not a part of the remedy) to enforce the rights because of the failure to perform the contract may be changed, if a hearing, and that in a court of justice, at some time is given. Obviously

it can hardly be claimed that a state can pass an act forfeiting a man's rights arbitrarily without giving him any hearing whatever; and in the first case the decision expressly excepted this, saying:

> *"What would have been the rights of the parties if time had not been given by the last statute within which to contest the forfeiture* evidenced by the commissioner's endorsement, *is a question not now necessary to be decided."*

Now, from these extracts, we are able to conclude a principle of law that *is* decisive of this case, and it is this: a statute of forfeiture, such as is here involved, is valid, (aside from the question of the equity of redemption), only *when coupled with a right to go into a court of justice and contest the forfeiture.* The language of the court, on this point in the two cases is explicit. Now the statute in question here gives us no right to go into a court of justice whatever, at any time. On the contrary, as we had the right under the earlier statute to be heard in court, *it expressly abrogated that right.* It follows, therefore, that under the authority of Wilson v. Standefer and Waggoner v. Black the statute in question is unconstitutional because it fails to give the party any hearing whatever in court and in consequence deprives him of property without due process of law. It is not, of course, necessary to cite this court any other decisions to this effect, and we refrain from doing so.

This error, committed by the State Supreme Court, arose from its misapprehension, expressed in

its opinion, that the statute here is substantially identical with the Texas statutes, involved in the cases cited; and this was due, we believe, to the misleading statement found in the Attorney General's brief, that the statutes are similar. *A more erroneous statement than this could not be made.* There are two vital differences, and one is made the very basis of the court's two decisions relied upon. It is that the Texas statute provides for a hearing in a court of justice after the forfeiture has taken place, *which is entirely omitted from the California statute.* The other difference is, that the Texas statute cut off no right of redemption, for the reason there was no statute in Texas which ever gave such right.

We have been thus explicit, in our review and examination of these decisions, because not alone do they fail to support the decision sought to be reversed here, but they do decide, in effect that the act of 1889, attacked by us, is unconstitutional.[9a]

Summarizing the argument, therefore, we conclude as follows:

(9a) There is, indeed, still another ground upon which the inapplicability of these decisions can be rested. The wording of the Texas statutes is quite different from the California statute, in other respects. For example, as pointed out in the first case by this court, "no title passes" to the purchaser, as under the California Statute is the case. And secondly, as already noted, the California statute deprives the defaulting purchaser of any right to be heard in court at all. Thirdly, there was no *right of redemption* ever given under the earlier Texas statute, which the subsequent act could affect, or attempt to destroy. These differences in the language of the California and the Texas acts were in the mind of the District Court of Appeal when it said in its opinion in this case, that the decisions construing the Texas statutes were "predicated upon the different working of the statutes of Texas." How different from ours is the language of the Texas statute will be seen by reading it as it is quoted in full in the margin in the second case cited, 188 U. S. 595.

(a) The act in question is unconstitutional because it not alone impairs, but it utterly destroys the right of redemption granted Brackett by the state statutes of 1869.

Barnitz v. Beverly, supra.

(b) It is unconstitutional because, while attempting to forfeit all the ownership of Brackett in the property, vested in him, and all his rights under the certificate of purchase, issued to him, it takes away from him and deprives him of any right to be heard, at any time, in a court of justice, upon the question.

Wilson v. Standefer, supra;
Waggoner v. Flack, supra.

In closing the point, we feel we ought to illustrate its force by an additional contention. Aside from the question of its unconstitutionality under the Federal Constitution, because the act of 1889 changed a vested equity of redemption, we mention now that the State Supreme Court in this case disregarded its own decision, which as a state question ought to have been conclusive on the point.

In Johnson v. Taylor, 150 Cal. 201, the California Supreme Court said:

> "We think the principle of Teralto Land etc. Co. v. Shaffer, 116 Cal. 518 (58 Am. St. Rep. 194, 48 Pac. 613), is decisive of the case at bar. *Under the law as it existed at the time of the sale, the plaintiff's right of redemption was not limited by any fixed time.* It lasted at least one year, and would last indefinitely thereafter, until thirty days after the purchaser should

> give the notice required by the statute. As was said in California etc. R. R. Co. v. Mecartney, 104 Cal. 616 (28 Pac. 448): 'It is provided (Pol. Code, sec. 3780) that a redemption may be made in twelve months from the date of the purchase, or at any time prior to the filing of certain affidavits and the application for the deed. "Or" may be read "and", for it is evident that all the recited events must happen before the owner will be deprived of his right to redeem.' To change a right of redemption which lasts indefinitely until the performance by a third party of some act which may or may not be performed, to a right limited by the expiration of a definite period of time *is a substantial change in the right.* And while, under the amendments of 1895, the right of redemption does not end absolutely with the expiration of the five years, it does end, without any notice to the owner, as soon as the state sees fit to dispose of the land. Under the old law the owner could rest secure *until he received notice of intention to apply for a deed.* He then had thirty days in which to redeem. *Under the new law, his right of redemption could be cut off* at any moment after the expiration of the statutory period, without any personal notification to him."

The identity of this case with the case cited in the quotation is plain; for here there was (a) a statutory right of redemption given; and (b) this right extended for the period of 20 days *after judgment had been entered in each individual case.*

Therefore, the statute here relied upon was a statute which not alone cut off this right of redemption, but paraphrasing the quoted language, changed "a right of redemption which lasts indefinitely

until the performance by a third party of some act" (in this case, the entry of a judgment), to a complete forfeiture of the exercise of that right at all.

II.

THE ACT IN QUESTION IMPAIRS THE OBLIGATION OF THE ORIGINAL CONTRACT ENTERED INTO BETWEEN THE STATE AND BRACKETT.

Much of the discussion advanced under Point I applies here, and need not be repeated. But there is here furnished the opportunity of showing another misapprehension by the state court of the terms of the act of 1889. That court said (Tr. p. 48):

> "The act of 1889, instead of giving to the holder of a certificate of purchase only 20 days after a declaration of forfeiture in which to redeem by paying up the arrears, gave him six months for the accomplishment of the result. The later was therefore more liberal to the holder of a certificate of purchase than was the earlier act. A judgment procured under the procedure provided by the act of 1868 amounted to a declaration of forfeiture or rescission which would become final unless within twenty days the arrears should be paid, and the same is true of the conditional forfeiture declared by the act of 1889, except that the period of redemption was very much longer, and therefore very much more favorable to the delinquent purchaser."

This statement contains a strong argument, if it were true in fact; but it is not. The act of 1889 is not quoted verbatim in the court's opinion; and

this may have been the cause of the misapprehension of its terms, so as to lead to the conclusion that it extended the period of time for paying up, and so was more liberal. We therefore requote it:

> "1. Whenever application has been made to purchase land from this state, and payment only in part has been made to the treasurer of the proper county for the same, and a certificate of purchase has been issued to the applicant prior to the twenty-seventh day of March, eighteen hundred and seventy-two, and whenever such applicant, his assignee or assignees, shall have failed for five years to pay to the state the arrears of principal or of interest due to the state for said land, and the state shall at any time heretofore have issued a certificate of purchase for the same land, or any part thereof, to a subsequent purchaser, then, unless the holder or holders of such prior certificate shall pay the entire residue of the interest remaining unpaid for such purchase within six months from and after the passage of this act, such holder or holders shall be deemed to have lost all right to the land described in said certificate, or to complete the purchase of such land, and all moneys heretofore paid to the State of California on such purchase shall be deemed and taken to be forfeited to the state."
>
> California Statutes, 1889, page 428.

Now under the laws of 1869, Brackett had twenty (20) days after judgment of foreclosure within which to redeem. Other certificate holders had the same period of time. These periods of time would expire according to the date of the judgment against each certificate holder respectively; which might be

on varying dates. Some of the dates might expire subsequent to the one year period found in the act of 1889. This act substituted for the twenty (20) day period, after each judgment, whatever its date might be, an arbitrary period of six (6) months—"from and after the passage of the act" is its exact language. How far the equity of redemption has been abrogated and how a substantive right, granted by statute, has been taken away altogether by these provisions, will be seen from the following illustrations:

The act of 1889 went into effect on March 30, 1889. Suppose, now, that prior to this date, the state had commenced foreclosure proceedings against some defaulting purchaser. The six (6) months period, fixed in the act, would expire six (6) months from March 30, 1889, or September 30, 1889, on which date the forfeiture fixed by the act became absolute. Now a lawsuit often lasts longer than six (6) months, and if in the instances of the supposed lawsuits, one of them had not terminated in a final decree by September 30, 1889, will our distinguished opponents tell us whether the right of redemption granted by the act of 1869 had been lost, if judgment were subsequently entered in that case?

But a better illustration is furnished by considering the facts in the instant case. Brackett did not pay up in full until after October 26, 1911. Now suppose that prior thereto the state had brought suit to foreclose upon this certificate of purchase, as it could have done. *The State Supreme Court*

says such a suit could have been brought, for the act of 1889 is a cumulative remedy, says the decision. It follows, then, that on October 26, 1911, the state could have proceeded under the act of 1869, in the instant case, to foreclose upon the certificate of purchase held by Brackett and his assignee, plaintiff in error. Suppose judgment of foreclosure had been entered on December 23, 1912,—an arbitrary date taken by us, merely because it is the date of Judge Seawell's judgment awarding the plaintiff a mandamus in this case. Would not the plaintiff in error have had twenty (20) days thereafter, within which he could have paid up in full, as permitted by the act of 1869? Will our opponents care to deny the correctness of this conclusion? Would not the plaintiff then have been entitled to a patent for the land? Now would it make any difference if the amount due were paid *before* the judgment were entered, though after such suit commenced? If not—and of course, it would not—would it make any difference if the money due were paid the state, *without* the suit? In other words if the object of the suit to foreclose upon the certificate is attained by paying the money, at any time during its pendency, surely the prospective defendant could anticipate the suit and pay the money due, without waiting to be summoned into court, with the same legal effect, as if suit had been commenced?

Now, strange to say, this is what really has been done in the present case. For it appears that prior

to the filing of the complaint, the plaintiff paid the state in full the amount due upon the certificate, principal, interest and penalties, and the state accepted the money. Surely, by this argument, we have demonstrated alike the unconstitutionality of the act of 1889, and the propriety of Judge Seawell's judgment, as originally rendered.

There is another illustration which seems also to prove that the act impairs the obligation of a contract; but as it is best discussed under point III we defer its particular mention at this time. The argument thus far establishes that the act is void in the light of the Federal Constitution.

III.

AS THE STATUTE OF 1869 MADE THE CERTIFICATE OF PURCHASE EVIDENCE OF TITLE AND FIXED OWNERSHIP IN BRACKETT, THE ACT OF 1889 DIVESTING BRACKETT OF TITLE AND OWNERSHIP, ONLY WHEN SOME ONE ELSE CLAIMED THE LAND OWNED BY BRACKETT, WAS A LEGISLATIVE TRANSFER OF TITLE FROM OUT OF BRACKETT TO THAT PERSON.

The issue of the certificate of purchase establishes title and ownership in the land (secs. 4, 68 and 69, supra). This title and ownership, of course, is property; and it will be conceded that it cannot be divested without due process of law.

At the risk of repetition we point out that the statute of Texas, which enforced a forfeiture, and which was sustained by this court, was sustained

because it gave a hearing in the courts. This is denied by the California act of 1889, invoked here. But another vice in this act remains to be pointed out; and it is this: effect is given to this act only upon a condition which vitiates the whole spirit of legislative enactments, and which is obnoxious to all constitutional restrictions. For it does not provide simply that certificates held by any and all persons in default, on a certain date, shall be forfeited, however objectionable, in view of the absence of a hearing in court, such proviso might be. It provides that only shall such a forfeiture take place when "the state shall at any time *theretofore* have issued a certificate for the same land to a subsequent purchaser". *By express terms, this language leaves the law of 1869 in force in those instances in which no subsequent certificate has been issued.*

Now, while this court, of course, cannot consider objections arising under the state or the common law to this act, the particular Federal objection that we now urge may be made clear by a reference to the provisions of the state laws upon the purchase of state land. When the certificate of purchase has been issued, the holder becomes the owner of an interest in the land (secs. 4, 68 and 69). The land, after that, is not subject to sale on the part of the state until after the judgment foreclosing upon the certificate has been entered and the 20 days period of redemption has run.[10]

(10) "After judgment foreclosing the interest of the purchaser or the holder of the certificate has been entered, and the certified copies filed, * * * *the land shall be again subject to entry and sale*, and a certificate of purchase may be issued in the same manner as if the land had never been entered and sold" (sec. 67).

This particular enactment is but the enactment of common sense and embraces a rule of common fairness to the citizen. The state ought not to attempt to sell land to one citizen while another citizen is vested with an interest or an ownership in it, thereby itself breeding litigation.

Now, what is the effect of the act of 1889 under the state laws? The issue of a second certificate of purchase for the land, while a former one is outstanding, uncancelled, is a violation by the state itself of its own laws; and as the act relied upon, the act of 1889, only attempts to invalidate certificates of purchase when subsequent certificates have been issued "for the same land", such subsequent certificates having been issued prior to the act itself going into effect, the force and effect of the act is only felt in those instances in which the state has violated its own laws. In addition, the act permits the holder of the prior certificate to pay up the entire residue within six (6) months after the passage of the act, notwithstanding the issue of the second certificate. Exactly what is to become of the second certificate holder, or his money in that event, neither the act, nor the State Supreme Court has pointed out; nor has the state Attorney General furnished an excuse, legal or moral, for the state's enacting a law, forfeiting the vested interest of a citizen when, and only when, it itself has endeavored to

transfer such interest to some other person in violation of its own laws.[11]

At this point we should specially inform the court that the act of 1889 does not in any way affect the interest of the state—is not an act passed for the benefit of the state. It is an act passed solely for the benefit of the holders of void certificates of purchase. They alone are benefited and helped by it.

We can make this very clear: if twenty certificates of purchase were outstanding upon which the purchasers had failed to pay the principal or interest for five years, and in ten of these cases the state should have seen fit to issue other certificates of purchase,—in those ten instances only are the first certificate holder's rights forfeited. *In the remaining ten instances the certificates would still be valid and uncancelled.* But this result is no benefit to the state. The state has gained nothing. This purely arbitrary distinction, having no foundation in law whatever, only is operative to invalidate valid certificates and to validate invalid certificates where such previous invalid or valid certificates may have existed. Otherwise it leaves them *and the state* unaffected.

This classification is not alone arbitrary, but is offensive to common sense and common fairness. Such questions, however, we repeat, are not open, probably, for discussion in this court.

(11) The District Court of Appeal doubtless had this in mind when it said that "the confusion or conflict in titles had arisen" through the fault of the state official.

We ought to point out here that in reality the issue of this second certificate in violation of law is not really the act of the state, but the improper act of a state official. The District Court of Appeal noted this, for it referred to his act in that connection as an act which gave rise to the "confusion or conflict in titles" and that his duty under the statute was purely ministerial (see appendix, post). The state official authorized to sell state lands or issue certificates of purchase is the register of the state land office. When a sale has been made and a certificate issued, his power at once ceases; the land is no longer open for sale. And this shows that any certificate afterwards issued by him is ultra vires and void; it is not a certificate issued *by the state* at all, but merely a certificate unlawfully issued by a state official, wholly without authority.

Now the act of 1889 is an act passed for the benefit of the holders of certificates theretofore issued by the state official improperly. From this it follows conclusively either that the act has no application and that its attempted application is a taking of property without due process of law or that the law itself is designed specially to take the title from the man who owns it and give it to the one who is utterly without any interest in it. At one and the same operation, it invalidates a valid certificate and validates an invalid one.

It will be observed *that it is only when a second certificate for the same land has been issued to*

another purchaser that this cancellation and forfeiture takes place, and this is rendered clearer by the fact that after the second certificate is issued, the first purchaser still has six months after the passage of the act within which to pay up. If he does not do so, then for the first time is his certificate cancelled, so that the validity of the first certificate is clearly recognized until the day of forfeiture, *which is after the issuance of the second certificate.*

How the state can issue a second certificate of purchase when a first certificate is still issued, outstanding and valid, we leave to the learned Attorney General to point out. *Such a second issue is in direct violation* of law (Sec. 67). Had the act provided that the second certificate could be issued *after* the forfeiture, a different question might have been presented. But that is not the real point we maintain.

This consideration of the wording, and the contingencies of the act, serve to demonstrate that the act is unconstitutional because it is a legislative transfer of property out of A into B.

By providing arbitrarily that while a first valid certificate is outstanding and *in the event that there shall have been (improperly) issued a second certificate,* the first certificate holder, unless he pays up within six months after the act, forfeits all his rights, *so that they pass to the second certificate holder,* the legislature is simply transferring prop-

erty of A to B; and this, it has been repeatedly decided, cannot be done.

> "A statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."
>
> 4 Encyc. of U. S. Supreme Court Reports, p. 223, citing many cases.

And such an act, says the author of Constitutional Law in the Encyc. of U. S. Supreme Court Reports, Vol. 4, page 223,

> "would be treated not as an exercise of legislative power, but as a sentence—an act of spoliation."

Not alone is this statute subject to this objection, but it is subject to the objection that it, in terms, declares a forfeiture without notice,

> "Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and properties cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law."
>
> Cooley's Constitutional Limitations, 7th ed., page 518.

The rights thus protected may be either legal or equitable, the present or future enjoyment of property or the present or future enforcement of a

demand, or the legal demand of another (idem, p. 511). *Thus, the right of a minor to redeem, when he comes of age, lands forfeited during his minority through a failure to pay taxes, is a vested right.*

Moore v. Irby, 69 Ark. 102; 61 S. W. 371.

And an act of the legislature extinguishing a mortgagor's title is void.

Railroad v. Elliot, 58 N. H. 451.

We quote a short extract from each of these cases:

> "The state acquired its right to the land subject to the minor's *right to redeem under the law in force at the time,* and this right of the minor could not be divested *by any subsequent act of the legislature.*"
>
> Moore v. Irby, 69 Ark. 102, 103.

> "The extinguishment of the mortgagor's title [Brackett, the original purchaser, is in the position of mortgagor in this case] by a special governmental decree, without consent, compensation, trial, or notice, *is not an exercise of any constitutional power.*"
>
> R. R. v. Elliot, 58 N. H. 451.

Illustrations and decisions in point could be multiplied indefinitely. They receive added force by considering the question as to what has become of the rights of the second certificate holder *in the event that the first certificate holder should pay up within six months after the passage of the act.* In that event, the first certificate holder is maintained in his rights. What has become of the second certificate holder and his money?

It must be remembered that this act does not provide a forfeiture, merely without notice (which would render it objectionable), for a failure to pay the principal and interest for a definite time, and then authorize the state to sell the land to another, *but it countenances the state in selling the land to B after having sold it to A, and then, for the first time, A's rights are forfeited and his money confiscated.* The act is clear on this point, for it says, in definite terms, that after the issuance of the second certificate, "then," unless the holder of such prior certificate, etc., shall pay the balance, etc., he is deemed to have lost all right and

> "all moneys heretofore paid to the State of California on such purchase shall be deemed and taken to be forfeited to the state."

The act, then, is one of confiscation, it is a sentence of condemnation without notice; and, in view of the fact that it recognizes that the second certificate holder will have no rights if the first purchaser shall pay up, it is a legislative transfer of property in that event from A to B.

IV.

We have been informed, unofficially, that the claim is made, with some show of seriousness, that the decision below rests upon a non-federal ground broad enough to sustain the judgment. Reserving to ourselves the right to reply fully, if this point

be made, we briefly call attention to the following answers to the claim:

1. The discussion already had shows there could not be a non-federal question involved, broad enough to sustain the judgment. The facts are agreed. If the act of 1889 is unconstitutional, the Brackett certificate is in force, in the hands of the plaintiff. It was the claim of the plaintiff, asserted by his complaint (Tr. p. 3, fol. 7), that this certificate was still in force. Now it was possible under the state law for it to have been cancelled in one of two ways only:

(1). By a judgment of foreclosure, in a court of justice, and this it is admitted has never been done.

(2). By the act of 1889. To regard the certificate as not in force is to assert the validity of the act, and this, of course, necessarily overrules the claim that the act violates the Federal Constitution.

2. The trial court, Seawell, J., found as a fact that the Brackett certificate had never been cancelled or annulled but was in full force and effect (Tr. p. 14, finding VII). Its decision was affirmed by the court of appeal. The conclusion of the trial court and of the appellate court, in this respect, was based upon the holding that the act of 1889 was unconstitutional. The court of appeal was quite specific on the point. This conclusion was reversed by the Supreme Court; and, of course,

this reversal was a finding, not alone that the act of 1889 was constitutional, but was a finding directly against our contention upon which we grounded our case, that the act violated the Federal Constitution because it impaired the obligation of a contract. This reversal could not have been ordered without holding the act to be constitutional, contrary to our contention.

3. The alleged non-federal grounds are not disconnected with the federal question involved, but are sustained by the State Supreme Court, solely because of its decision with respect to the federal question. The non-federal questions are laches and the statute of limitations; and in this regard the State Supreme Court said:

> "Appellant contends that the delay on the part of Brackett and his associates, extending over many years, amounted to laches, and this, as the learned attorney general insists, is true whether we consider the foreclosure suit in which judgment was given against 'A. B. Brackett and John Doe' in 1874 as being void upon its face or not. Without reference to the validity or infirmity of the judgment, these facts are evident: Brackett was in default January 1, 1873. Phillips has possessed since 1886 a certificate which was prima facie evidence of title. Section 3514, Pol. Code. *Since 1889 the statute has declared the effect of the later certificate if uncontested*, yet not until 1911 did Brackett's successor seek to make payment of any sort to the state. For more than 38 years no attention was paid to the obligation to pay interest in advance each year to the state. Meanwhile the state had at least attempted foreclosure proceedings, *and in 1889*

> *had constructively notified all persons interested in the matter of the intention to disregard any asserted rights to the land arising under the Brackett purchase unless the arrears should be paid,* yet nothing was done by the holder of the certificate which had been issued to Brackett until after the completion of the sale to Phillips. *Under these circumstances,* the statute of limitations, which was pleaded, clearly applies."

It is plain that it is because of the supposed validity of the act of 1889 that the court sustains the plea of the statute and laches; and not upon the supposition of its invalidity, which is necessary for the non-federal grounds to be sufficient to support the decision. For example, the court refers to the fact that *"since 1889 the statute has declared the effect of the later certificate if uncontested",* referring to the act of 1889, and treating it as valid. So again, referring to the statute, it says that "in 1889 it had constructively notified all persons interested in the matter of the intention to disregard any asserted rights to the land arising under the Brackett purchase, unless the arrears should be paid, yet nothing was done" and etc. It is plain the court is referring to the statute as a valid enactment, evidencing the basis for the claim, otherwise the court must be supposed to make a reference to an unconstitutional measure as the basis of judicial action!

4. This must be so, because the pleas of the statute and laches are too absurd, and too utterly groundless for it to be supposed that the court would rest its decision upon them. The validity

of the statute gives the claim of these pleas basis; without it, they become ridiculous.[11a]

For the state statute of limitations governing mandamus is three years. But the plaintiff had no right to bring mandamus until he had paid up in full and demanded a patent, and this was not until October, 1911 (Tr. p. 14, fol. 32, finding VIII). He brought suit within four months thereafter (Tr. p. 4, fol. 9).

Now, if the certificate was in force, because the act of 1889 was unconstitutional, the plaintiff had until it was cancelled within which to pay the amount, and (except for the act of 1889) it was admitted the certificate was never cancelled. And the state accepted the money shortly before October, 1911. It follows, therefore, that unless upon the theory of the validity and constitutionality of the act of 1889, we must attribute to the State Supreme Court the judicial holding that the three year statute can run out in four months, and that a cause of action can be barred before it has accrued. For, if the plaintiff, conceding the validity of the certificate of purchase in 1911, had a right to pay the state the balance then due, the cause of action for mandamus, here, which did not accrue until the money was paid the state, could hardly have become barred several years before! A decent respect for the opinion of the State

(11a) How laches or the statute of limitations can be involved when the state was paid in full for the land as late as *October, 1911*, by plaintiff in error (Tr. 4, finding VIII, fol. 32) and when for the first time a patent could be demanded, it is not easy to conceive. *This suit was commenced within four months thereafter.*

Supreme Court should not lead us to attribute to it such a decision.

5. Even if we were to regard the State Supreme Court as not directly connecting the validity of the statute of 1889 with the plea of laches and the statute of limitations, still the jurisdiction must be sustained. There are other principles which control here: *first,* the non-federal question must be a real substantive question; *second,* where the federal right is denied as the result of a finding of fact, upon an alleged non-federal ground, and it is contended there is no evidence to support it, the resulting question of law is open for decision; *third,* where the claim is grounded upon a federal right, though state statutes are considered, and made the basis for the decision, to use the language of this court, "the grasp of the federal statute must first be released" (see cases post); and the jurisdiction attaches. The following quotations apply to all three propositions, and speak for themselves:

A clear statement of the law is found in Chicago, B. & Q. R. R. Co. v. Illinois, 200 U. S. 561, in which Mr. Justice Harlan said:

> "1. The first question is one of the authority of this court to review the judgment below. As we have seen, the railway company insisted in the court of original jurisdiction that the statute under which the drainage commissioners proceeded could not be applied in this case without taking its property for public use without compensation, and therefore depriving it of property without due process of law, or without denying to it the equal protection of

the laws, guaranteed by the Constitution of the United States. The judgment of the trial court was adverse to that view. In the supreme court of the state the railway company, by its assignment of error, preserved its objection based on constitutional grounds. That court did not, in words, refer to the Constitution of the United States, and its opinion concluded: 'Entertaining the view above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of sec. 40½ of the farm drainage act.' (212 Ill. 120; 72 N. E. 225.)

The contention is that as the state court based its judgment on the common-law duty of the railway company, and not expressly on any Federal ground, it cannot be said that there was any denial of the federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to re-examine the final judgment. Rev. Stat. sec. 709, U. S. Comp. Stat. 1901, p. 575.

Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however, the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judg-

ment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. *If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company.* And that result could not be avoided merely by silence on the federal question, *and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for the supreme law of the land must always control.* Therefore, a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, *necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied.* That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, *it may not be ignored,* and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have re-examined the judgment. *But the decision was otherwise, and was, in law, a denial of the claim of a Federal right.*

> For these reasons we are of opinion that this court has jurisdiction to re-examine the final judgment of the state court so far as it involved the Federal right or immunity specially set up by the railway company."

This extract states the true principle governing this case.

But there is another and still clearer ground upon which jurisdiction attaches here. One of the claims made at the time of the filing of the complaint in this case was that the act in question impaired the obligation of a contract between the plaintiff in error and the state. In other words, the clause of the Federal Constitution, that no state should pass a law impairing the obligation of the contract, was specially relied upon. Now, when this is the case, it is the law that the jurisdiction attaches without regard to whether or not any other question was considered. This doctrine is illustrated by Attorney General v. Lowrey, 199 U. S. 233, 238, in which Mr. Justice McKenna said:

> "The grounds of attack upon the validity of the act creating the new district in the supreme court of the state were as follows:
>
> First. It deprives this school district or municipality of the right of local self-government, guaranteed to all municipalities by the Constitution.
>
> Second. The title to the act indicates, and the act itself embraces, more than one object.
>
> Third. The act is broader than the title; the body of the act embraces many objects not covered by the title.

Fourth. *The act as passed impairs the obligation of the contracts,* within the meaning of the Constitution of the United States and the Constitution of the State of Michigan.

With the first three grounds we have no concern. They present strictly local questions. We are concerned with the fourth ground only in so far as it invokes the Constitution of the United States. The Supreme Court disposed of this ground as follows: 'We have already shown that the obligation of contracts is not impaired. The districts did not hold this property under any contract with the state, but as a public agency.' *In other words, the non-existence of a contract was rested on the construction of the Constitution and the laws of the state, and hence defendant in error contends that the decision of the court did not involve a Federal question. This, however, overlooks the power and duty of this court to determine for itself the existence or non-existence of a contract.* Other grounds in support of the motion to dismiss are urged which, we think, are also untenable. The motion is therefore denied."

In Anderson vs. Carkins, 135 U. S. 483, Mr. Justice Brewer said:

"Two questions are presented—one of jurisdiction, the other of error.

First, with respect to jurisdiction: it will be observed that the contract is prima facie good. The land is described, the consideration stated and its receipt acknowledged, a sale affirmed, an agreement to convey recited and the time for the conveyance specifically named. To a bill for the specific performance of this contract the defendants answered that the contract was void under the Homestead Laws of the United States. Notwithstanding this de-

fense, so expressly stated, a decree for specific performance was entered against them. Obviously, this could not be so entered without adjudging such defense insufficient, and denying to them the protection claimed under the Homestead Laws. It is true that the Supreme Court of Nebraska, in its opinion, relied principally on two sections of the statutes of Nebraska; but it also, and as plainly, ruled that the defense that the contract was against public policy and void was not sustainable, and that the Homestead Laws carry with them no protection against such a contract. If under their provisions such a contract is void, then obviously no state statute can vitalize the contract, or deprive a party thereto of the protection afforded by the federal statutes. Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the Homestead Laws, and as the Supreme Court of Nebraska expressly declared that this invalidity under the Homestead Laws was not sustainable, it follows that the case is one in which a right was specifically set up and claimed under the Statutes of the United States, and the decision and judgment of the state court were against that right. Hence the jurisdiction of this court cannot be doubted. Murdock v. Memphis, 87 U. S. 20 Wall. 590 (22:429). *It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court.*"

In Yazoo & M. Valley R. R. Co. v. Thomas, 132 U. S. 174, Chief Justice Fuller said:

"The Supreme Court of Mississippi did not put its decision upon the ground that it was not competent under the State Constitution for the state to contract with the company that the latter should not be subjected to taxation, but upon the ground that the exemption claimed could not be allowed. The taxes in question were assessed under the Act of 1888, and if the charter of the company, which became a law on the 17th of February, 1882, inhibited such taxation, *then this court has jurisdiction to re-examine the conclusion reached.* Although by the terms of the Act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the Act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the Act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes; for if the contract existed those laws became inoperative, and would be reinstated by the Act of 1888. The motion to dismiss the writ of error is therefore overruled."

In the great case of Scott v. McNeal, 154 U. S. 34, there is a statement applicable to this case, as follows:

"Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, *or of the state,* when the question is whether the statute pro-

> vided for the notice required to constitute due process of law, *than when the question is whether the statute created a contract which has been impaired* by a subsequent law of the state, or whether the original liability created by the statute was such that a jugment upon it has not been given due faith and credit in the courts of another state. *In every such case, this court must decide for itself the true construction of the statute.* Huntington v. Attrill, 146 U. S. 657, 683, 684 (36:1123, 1133); Mobile & O. R. Co. v. Tennessee, ante, p. 793."

The two cases of Waggoner v. Flack and Wilson v. Standefer, themselves sustain the jurisdiction. In the first case, 188 U. S. 600, it is said that where "the question of an impairment of an alleged contract by subsequent legislation" is raised, this court is "not therefore bound by the construction which the state court places upon the statutes of the state which are involved in such an inquiry". And in the second case, 184 U. S. 411, it is held, that this court

> "possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, *and whether its obligation has been impaired by the state enactment".*

In a most recent case on this subject, Louisiana R. & N. Co. v. New Orleans, 235 U. S. 164, Mr. Justice Hughes says:

> "The defendant in error moves to dismiss, invoking the established rule that, where the state court gives no effect to the subsequent enactment, the jurisdiction of this court does not attach. Knox v. Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414, 415; Lehigh Water Co. v.

Easton, 121 U. S. 388, 392, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 38, 39, 31 L. ed. 607, 614, 615, 8 Sup. Ct. Rep. 741; Central Land Co. v. Laidley, 159 U. S. 103, 111, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Bacon v. Texas, 163 U. S. 207, 216, 219, 41 L. ed. 132, 136, 137, 16 Sup. Ct. Rep. 1023; Fisher v. New Orleans, 218 U. S. 438, 440, 54 L. ed. 1099, 1100, 31 Sup. Ct. Rep. 57; Missouri & K. Interurban R. Co. v. Olathe, 222 U. S. 187, 190, 56 L. ed. 156, 158, 32 Sup. Ct. Rep. 47; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 639, 56 L. ed. 924, 928, 32 Sup. Ct. Rep. 577. We are of the opinion that the present case is not within this rule. It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guaranty. Jefferson Branch Bank v. Skelly, 1 Black, 436, 442, 443, 17 L. ed. 173, 177; Bridge Proprs. v. Hoboken Land & Improv. Co., 1 Wall. 116, 144, 145, 17 L. ed. 571, 576, 577; Northwestern University v. Illinois, 99 U. S. 319, 321, 25 L. ed. 388, 389; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 492, 38 L. ed. 793, 795, 14 Sup. Ct. Rep. 968; Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 556, 58 L. ed. 721, 725, 34

Sup. Ct. Rep. 364; Russell v. Sebastian, 233 U. S. 195, 202, 58 L. ed. 912, 920, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282. And, in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court. McCullough v. Virginia, 172 U. S. 102, 116, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 76, 77, 44 L. ed. 673, 679, 680, 20 Sup. Ct. Rep. 545; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 175, 54 L. ed. 144, 147, 30 Sup. Ct. Rep. 40; Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 376, 58 L. ed. 1001, 34 Sup. Ct. Rep. 627. In the present case, it is apparent that the whole object of the suit was to establish the right of the city to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privileges therein described. It was, as appears from the petition itself, to accomplish the purpose of the later enactment, and the building of the belt line thereunder, that the city asked the aid of the court's injunction in this suit; and it was through this protection that the municipal scheme of construction under the later ordinance was actually carried out. The final judgment completed and made permanent this protection, with respect to operation as well as construction, as against the claim of contract right. It must follow that this court has jurisdiction to determine whether that claim is well-founded; that is, whether there is a contractual obligation which the plaintiff in error is entitled to enforce without its being impaired by the operation of the subsequent provision having, by virtue of state authority, the force of state law."

Confusion has crept into the books as a result of the general impression that this court will never review a question of fact on writ of error to a state court. Mr. Chief Justice White has undertaken to clear the subject up in the following language:

> "While it is true that upon a Writ of Error to a State Court we do not review findings of fact, nevertheless, two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of the denial of the Federal right."
>
> Creswill v. Grand Lodge K. P., 225 U. S. 243.

The case cited gives authority in support of this rule and it has since its rendition been approved.

See Southern Pacific v. Schuyler, 227 U. S. 601; Carlson v. Washington, 234 U. S. 103

In the case cited Mr. Chief Justice White illustrates the application of that principle of sustaining jurisdiction to review a question of fact where it was claimed "that there was not any evidence justifying the finding made by the court concerning fraudulent purpose, injury to property, deception of the public, etc.," and in that case, which was upon error to the

Supreme Court of Georgia, the judgment of the state court was reversed.

6. That a decision by a state court that a cause of action is barred by a state statute of limitation cannot defeat the jurisdiction where the question of the statute is involved in the Federal question submitted is substantially held in

Lavagnino v. Uhlig, 198 U. S. 443 (see p. 450);

Rankin v. Barton, 199 U. S. 228.

It is therefore respectfully submitted that the decision of the State Supreme Court should be reversed, and that of the Superior Court affirmed.

Dated, San Francisco,
March 4, 1918.

R. P. HENSHALL,
Attorney for Plaintiff in Error.

(APPENDIX FOLLOWS.)

APPENDIX.

In the District Court of Appeal
State of California
First Appellate District

No. 1344

B. M. Aikins,
Plaintiff and Respondent,
vs.
W. S. Kingsbury, as Register of the State Land Office,
Defendant and Appellant.

OPINION.

This proceeding was instituted by an application for a writ of mandate to compel the appellant as register of the state land office, to issue a patent for a certain tract of school land in Kern County. The facts out of which the proceeding arose are the following:

On June 3, 1869, the State of California issues to one Charles A. B. Brackett a certificate of purchase of the lands in question, upon the payment by said Brackett of the part of the purchase price required by the statute, as the first payment upon said purchase. The statute as it then stood provided that the purchase price of lands of this character should be $1.25 per acre, payable 20% within fifty days from the date of the certificate of location issued to the

purchaser, and the balance, bearing interest at the rate of 7% per annum in advance, to be due and payable within one year after the passage of any act of the legislature requiring such payment, or before, if desired by the purchaser (Stats. of 1867 and 1868, sec. 51, p. 521). The statute as then in force further provided that, in case of default on the part of purchaser of school lands in making the annual payment of interest required by the terms of the purchase, the district attorney of the county in which such lands were situated should commence a suit to foreclose the interest of such delinquent purchaser. Charles A. B. Brackett made no further payments upon his purchase of these school lands, nor were any made upon account of his certificate of purchase for many years. On August 13, 1874, an action was commenced in the district court in and for Kern county purporting to be an action to annul the Brackett certificate, and foreclose the interest of Brackett in the land. The defendants named in that action were A. B. Brackett and John Doe. The summons was issued and returned unserved, and it was then attempted to obtain jurisdiction of the defendants by the publication of summons; and upon such publication judgment by default was entered against the defendants named in the complaint and summons, foreclosing the interest and annulling the certificate of purchase of "A. B. Brackett" in and to such premises. In December, 1886, the register of the state land office issued another certificate of purchase to one Michael Phillips, covering the same premises. In

March, 1889, the legislature passed an act relating to school lands, which provided that whenever an applicant to purchase school lands shall have failed for five years to pay to the state the arrears of principal or interest due to the state for such lands, and the state shall have at any time heretofore issued a certificate of purchase for the same land or any part thereof to a subsequent purchaser, then, unless the holder or holders of such prior certificate shall pay the entire residue of the interest remaining unpaid for such purchase within six months from and after the passage of the act, he shall be deemed to have lost all right to the land embodied in his certificate, or to complete ~~the~~ purchase of such land. (Stats. 1889, p. 428.)

In the year 1911, petitioner for this writ of mandate became the assignee of whatever rights said Charles A. B. Brackett had by virtue of the issuance to him of the first certificate of purchase, and shortly thereafter tendered final payment in full of the principal and interest due upon the purchase price of said land, and all necessary fees in accordance with the terms of such certificate, and thereupon demanded that a patent be issued to him for said land; which being refused by the register, he applied for this writ; and from the judgment granting his said application, this appeal has been taken.

(1) The appellant contends for the first time in his reply brief that the rights of Charles A. B. Brackett in and to said lands by virtue of her cer-

tificate of purchase thereof were foreclosed and annulled by the decree of the district court in the case of the People v. A. B. Brackett and John Doe. But we think this belated contention of the appellant is not very seriously urged. The complaint, summons, publication and judgment in that action were directed not against Charles A. B. Brackett, but against A. B. Brackett. These two names were not the same, and the entire omission of the given name of the holder of the certificate, whose rights therein were sought to be foreclosed, must be held to be a fatal objection to the jurisdiction of the court over him, especially when that jurisdiction was sought to be obtained only by publication. (McNally v. Mott, 3 Cal. 235; Sutter v. Cox, 6 Cal. 415; Ford v. Doyle, 37 Cal. 346; Hall v. Yoell, 45 Cal. 584; Houghton et al. v. Tibbets et al., 126 Cal. 57). Besides, there is some slight evidence before the court that this judgment was subsequently set aside on motion by the court ordering it, and it does not seem to be seriously disputed by the appellant that this is true.

(2) The next contention of the appellant is that the rights of Charles A. B. Brackett, and hence of his assignee were forfeited by the state under the terms of the statute of 1889, the substance of which is above set forth. The difficulty with this contention consists in the fact that the certificate of purchase of this land, issued by the state to Charles A. B. Brackett, constituted a contract, the whole terms of which were embodied in the statute which provided for such purchase, and in which the rights

of the respective parties to such contract, in the event of any default on the part of the purchaser, were expressly set forth, and these did not embrace any right on the part of the state to put the purchaser in default as to the payment of the balance of the principal sum due upon the purchase price of the property, save by and after a legislative act demanding such payment; nor to enforce any penalty against the purchaser for his default in the payment of his annual interest except through the medium of a foreclosure suit against him after such default, and in which he could exercise the right of redemption expressly given by that statute. The state never passed a legislative act demanding payment of the principal due on this purchase; and, as we have seen, it failed to properly institute or prosecute its foreclosure suit. These were the only two forms of remedy which the state had reserved to itself under this contract with Brackett; and it must be held to be a clear violation of the obligations of this contract to undertake to work a forfeiture of the interest of the purchaser or to impair his right to redemption in the manner provided by the act of 1889. (Welsh v. Cross, 146 Cal. 621, and cases cited.) The cases of Fristie v. Blum, 92 Texas 76; Wilson v. Standefer, 184 U. S. 399, and Waggoner v. Flack, 52 S. W. 584, chiefly relied upon by counsel for appellant in support of their views upon this point, will all be found to be predicated upon the different working of the statutes of Texas, from which state they went up; and when closely considered will not be found to be out of accord with

our conclusions as to the ineffectiveness of the California statute of 1889 in aid of the appellant's case.

(3) The next two contentions of the appellant may be treated together; they refer to the statute of limitations and to laches as barring the right of the petitioner for this writ, but the statute of limitations could neither have begun to run, nor the doctrine of laches commenced to operate against the right of the purchaser of these lands, or his assignee, to maintain this proceeding, until the payments required by the contract had been tendered in order to entitle the purchaser or his assignee to a patent; and as to the previous years of default in making these required payments, the state had its remedy or remedies, and the purchaser was entitled, under his contract, to wait, if he chose, until these were invoked, and then to save his rights by making his deferred payments. It follows that neither the bar of the statute nor the doctrine of laches could have operated against him during this prior period; nor do any of the cases cited on the part of the appellant touch this situation nor militate against these views.

(4) Finally appellant contends that the fact that the state, in the year 1886, undertook to issue another certificate of purchase to one Michael Phillips, which is outstanding, creates a case of conflicting claims of title, which the court ought not to determine upon an application for a writ of mandate; but we do not think any question of conflicting titles

is involved in this case, but only the right of the petitioner to have a ministerial officer perform his duty by issuing to him a certain muniment of title, to which he has become entitled under the statute through compliance with its terms. In such cases the fact that a question of title between the petitioner and some other person not a party to the proceeding may be incidentally involved will not operate to take away the usual and ordinary means provided by the code for compelling an officer to perform a ministerial duty prescribed by law; especially when it is by the act of that official that the confusion or conflict in titles has arisen. (Bannerman v. Boyle, 160 Cal. 197.)

The judgment is affirmed.

RICHARDS, J.

We concur:

KERRIGAN, J.

LENNON, P. J.

Filed July 13, 1914.

PERCY J. HAYSELDEN, Clerk.

Office Supreme Court, U. S.
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JAMES D. MAHER,
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In the Supreme Court
OF THE
United States

October Term, 1917

No. 265

B. M. AIKINS,
Plaintiff in Error,

vs.

W. S. KINGSBURY, as Register of the State Land Office,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

This is a writ of error to the Supreme Court of the State of California upon a judgment of that Court reversing a judgment of the Superior Court of that State rendered in favor of the plaintiff in error in a proceeding in mandamus.

The essential facts are as follows:

On June 3, 1869, acting under an act of the Legislature of the State of California approved

March 28, 1868 (Statutes of 1867-8, p. 507, *et seq.*), the Register of the State Land Office issued to one Charles A. B. Brackett a certificate of purchase of certain state school lands situated in Kern County in that State. (Tr. pp. 13, 14, fols. 30, 31, finding VI.)

Section 51 of that act provides:

> "The unsold portion of the five hundred thousand acres granted to the State for school purposes, the unsold portion of the seventy-two sections granted to the State for a seminary of learning, the unsold portion of the ten sections granted to the State for the erection of public buildings, the sixteenth and thirty-sixth sections granted for school purposes, and lands selected in lieu thereof, shall be sold at the rate of one dollar and twenty-five cents per acre, in gold coin, payable twenty per cent. of the principal within fifty days from the date of the certificate of location issued to the purchaser by the Surveyor-General; the balance, bearing interest at the rate of ten per cent. per annum, in advance, shall be due and payable within one year after the passage of any act of the Legislature requiring such payment, or before, if desired by the purchaser."

At the time of the issuance of the certificate of purchase the purchaser Brackett paid the portion of the principal required by the statute and interest on the balance to the first day of January, 1870 (Tr. p. 13, fol. 5, finding V), and thereafter paid interest on such balance up to January 1, 1873, but no further payments of principal or interest on account of such certificate were made up to October 30, 1911. (Tr. p. 20, fol. 45.)

Further provisions of said act of March 28, 1868, are as follows:

"Section 6. The Register of the State Land Office shall, on or before the first day of May of each year, prepare and forward to the District Attorney of each county a statement embracing all the lands in the county upon which payments have not been made according to law. Said statements shall show the name of the purchaser, the number and date of the survey or location and of the certificate of purchase, the amount paid, the amount unpaid and the amount then due; * * *"

"Section 65. Upon receipt of the delinquent list aforesaid from the Register of the State Land Office, as provided in section six, the District Attorney shall add thereto a notice that if the said amount due shall not be paid in fifty days after the date thereof, he will commence suit to foreclose the interest of said purchasers in the said lands, and shall publish said list, with said notice appended, for four consecutive weeks immediately following the date of the notice; or if there shall be no newspaper published in said county, then he shall post copies of the same in at least five public places in the county. After the expiration of the fifty days, the District Attorney shall, in the name of The People of the State of California, commence an action in the District Court against all purchasers or holders of certificates of purchase who have not either paid said amount so due, together with the cost of publication, or surrendered the title to the State, as provided in the preceding section, to obtain a decree of foreclosure of the interest of the purchaser or holder of the certificate of purchase in the land and to annul said certificate of purchase. If the name of the holder of the certificate be not known, he may be sued under a fictitious name, and service

of the summons may be had by publication in some newspaper published in the county for four weeks; or if no newspaper be published in the county, then by posting one copy of the summons for four weeks at the court-house door of the county, and two copies in public places in the township where the land is situated."

"Section 66. When a decree shall have been obtained, and within twenty days after the entering up of said decree, the District Attorney shall cause a certified copy of said decree to be filed in the office of the Register of the State Land Office, and another certified copy in the Recorder's office of the county in which the land is situate. The holder of the certificate of purchase may, at any time before the expiration of the twenty days provided for filing a certified copy of the decree in the office of the Register of the State Land Office and Recorder of the county, pay to the Sheriff, for the State, the amount due the State and the costs of suit that have accrued up to time of payment; whereupon the District Attorney shall dismiss the suit, and the purchaser or holder of the certificate of purchase shall be restored to his rights in the land, the same as if no neglect or forfeiture had been made. The District Attorney shall be entitled to receive ten dollars for each suit brought."

"Section 67. After the decree of the Court foreclosing the interest of the purchaser or the holder of the certificate has been entered, and the certified copies filed in the offices of the Recorder of the county and the State Land Register, the land shall be subject to entry and sale, and a certificate of purchase may be issued, in the same manner as if the land had never been entered and sold. * * *"

In the year 1874 the District Attorney of Kern County, having received from the Register a delin-

quent list showing that default had been made in the payment of the interest due on the certificate of purchase in question, commenced an action to foreclose the interest of the purchaser in the lands described in that certificate. In that action the defendants were designated in the complaint as "A B. Brackett and John Doe, Unknown Owner and Holder of Certificate of Purchase No. 2165 of the following described State School Lands:" etc., the lands were described, the necessary facts showing the default in the payment of interest were alleged and prayer made for a decree of foreclosure and annulment in accordance with the statute. Summons was published running to defendants designated in the same manner, default of such defendants was entered and a decree was signed and entered foreclosing and annulling said certificate of purchase. (Tr. pp. 22, 29, fols. 50, 67.)

In the year 1886 one Michael Phillips made application to the State Surveyor General to purchase the lands in question, paid the initial amounts required by the statute, the application was approved by the Surveyor General and a certificate of purchase thereof, No. 10,300, was issued to him on December 29, 1886. (Tr. pp. 30, 31, fols. 68, 71.)

In the year 1889 the Legislature of the State of California passed an act which was approved on March twentieth of that year. This act is set forth in the Statutes of 1889, at page 428, and is as follows:

"Section 1. Whenever application has been made to purchase land from this State, and payment only in part has been made to the Treasurer of the proper county for the same, and a certificate of purchase has been issued to the applicant prior to the twenty-seventh day of March, eighteen hundred and seventy-two, and whenever such applicant, his assignee or assignees, shall have failed for five years to pay to the State the arrears of principal or of interest due to the State for said land, and the State shall at any time heretofore have issued a certificate of purchase for the same land, or any part thereof, to a subsequent purchaser, then, unless the holder or holders of such prior certificate shall pay the entire residue of the interest remaining unpaid for such purchase within six months from and after the passage of this act, such holder or holders shall be deemed to have lost all right to the land described in said certificate, or to complete the purchase of such land, and all moneys heretofore paid to the State of California on such purchase shall be deemed and taken to be forfeited to the State. Nothing herein contained, however, shall be deemed or taken to give to or confer upon the holder or holders of such prior certificates, or any of them, as against the State of California or any subsequent purchasers therefrom, or against the holders of subsequent certificates of purchase, any other or greater right to the lands herein referred to than is now held by the holder or holders of such prior certificates, or to confer upon such holder or holders any new right, or to affect or impair the rights of such subsequent purchasers or their assigns.

Sec. 2. The mere fact of previous part payment shall not of itself confer on such prior purchaser or his assigns any right to complete the purchase, if he or they be not otherwise entitled so to do, as against the State,

and a subsequent purchaser or his assigns; *provided,* that this act shall not apply to any action now pending commenced within five years.

Sec. 3. This act shall take effect from and after the date of this passage."

On August 28, 1911, the full amount due the State on the Phillips certificate of purchase was paid and the certificate surrendered but a patent under that certificate was refused because of antagonistic demands for the land (Tr. p. 31, fol. 71), one Fred W. Lake, who had by transfer in 1889 succeeded to the interests of Brackett (Tr. p. 18, fol. 40), having filed with the State Land Office on August 19, 1911, a protest against the issuance of a patent upon the Phillips certificate. (Tr. pp. 31, 33, fols. 72, 76.) On October 26, 1911, Lake conveyed his interests to the plaintiff in error (Tr. p. 18, fol. 41) who thereafter on October 30, 1911, tendered payment upon the Brackett certificate (Tr. p. 20, fol. 45) and demanded a patent which was refused and thereafter in February, 1912, commenced this proceeding in mandamus in the Superior Court of the State of California to compel the defendant in error to issue to him such patent. (Tr. pp. 1, 4, fols. 3, 9.) The Superior Court rendered judgment for the plaintiff, and, the District Court of Appeal on appeal thereto having affirmed the judgment, the case was transferred to the Supreme Court of the State where the judgment of the Superior Court was reversed and the lower Court ordered to dismiss the pro-

ceeding. The grounds of reversal by the Supreme Court of the State, as appears from the opinion of that Court set forth in the record (Tr. pp. 45, 51, fols. 193, 115) were, first, that noncompliance with the provisions of the act of 1889 had the effect of forfeiting all rights of the holder of the certificate of purchase to the lands in question and, secondly, that any rights held by the original holder of the certificate of purchase and his successor in interest were barred by laches and the statute of limitations.

Brief of the Argument.

I.

NO FEDERAL QUESTION IS INVOLVED.

At the outset we urge that this writ of error should be dismissed upon the ground that there is no federal question presented for this Court to consider, in view of the holding of the Supreme Court of the State upon the question of laches and the statute of limitations presented in the case.

Plaintiff in error contends that the decision of the Supreme Court of the State of necessity rests upon the validity of the act of 1889 and that the finding of laches or the bar of the statute of limitations can find support only upon the basis that that act was a valid enactment.

It is the position of the defendant in error that not only did the Supreme Court of the State find in its decision that the rights of the plaintiff in

error were barred by laches and the statute of limitations, irrespective of the validity of the foreclosure proceedings and of the act of 1889, but that such is the fact and should be so held by this Court and that if there is sufficient in the case to sustain the position of the Supreme Court of the State in that regard this Court should dismiss this writ of error for want of jurisdiction.

II.

THE RIGHTS, IF ANY, OF THE PLAINTIFF IN ERROR WERE BARRED BY LACHES AND THE STATUTE OF LIMITATIONS.

It will be noted that the certificate of purchase was issued to Brackett on June 3, 1869, and that he paid his interest only to January 1, 1873. Thereafter neither he nor any of his successors in interest fulfilled their obligation to the State to pay the interest upon the balance of the purchase price until October, 1911, a period of 38 years. In the meantime a foreclosure proceeding against his rights under his purchase had been commenced and had resulted in a judgment annulling his certificate on November 30, 1874, and entered on the same day.

No objection can be raised to the fact of the filing of the complaint but plaintiff in error objects to the sufficiency of the judgment because of the alleged insufficient designation of Charles A. B. Brackett as a party defendant. The Supreme

Court of the State quoted the provisions of the statute (section 65, *supra*) to the effect that if the name of the holder of the certificate was not known he might be sued under a fictitious name and service of summons be had by publication, but declined to pass upon the validity of the proceedings had in the particular foreclosure suit. It did, however, in a measure interpret the statute under which such proceeding was had and asserted that "No actual notice of the entry of judgment or of the filing of copies was required under the act of 1868. The notice was not necessarily personal and the purchaser was charged with the same degree of constructive notice by the act of 1889" (Tr. p. 48, fol. 108.) It also asserted that "the State had at least attempted foreclosure proceedings" and though it did not express an opinion as to the validity thereof, we may assume from its discussion thereon that it found therein an assertion by the State of a position antagonistic to the rights of the certificate holder.

The defendant in error urged the sufficiency of these proceedings before the State Supreme Court and claimed that the purchaser Brackett and the plaintiff in error as his successor in interest, were concluded thereby. This position we now reassert and urge upon this Court as an additional reason why it should not assume jurisdiction. Were it not that we believe that the judgment of the State Supreme Court is amply supported on each of the two points decided by it and that a discussion

of other points might unduly extend this brief we would show that these foreclosure proceedings concluded the rights of the certificate holder; that though one of the defendants was named in the complaint and in the summons as "A. B. Brackett" and not as "Charles A. B. Brackett" yet the land, the number of the certificate and the date of issuance were all correctly designated as required by the statute, and that if the designation of one defendant as A. B. Brackett and the publication of summons under that name did not conclude Charles A. B. Brackett, certainly the designation of the fictitious defendant John Doe and publication of summons under that name was a full compliance with the statute and conferred jurisdiction upon the court over the purchaser Charles A. B. Brackett and the holder of the certificate, such method of acquiring jurisdiction having been subscribed to by the purchaser, and by any holder of the certificate, when accepting such certificate and claiming rights thereunder; that whether certified copies of the decree were filed by the District Attorney as required by the statute was immaterial as no rights were made to depend thereon, but that if necessary it would be presumed after such great lapse of time and in the absence of a showing to the contrary that the public official had duly performed his duty; and finally, that such proceedings being valid the rights of all parties were thereby established and the stage was set for subsequent action by the State with respect

to the lands involved, and without the power of interference therewith by any Court except pursuant to a subsequent legislative authorization.

It is perhaps unnecessary to pursue this point further in view of the other circumstances. Whether the foreclosure proceedings were valid or not, they serve apparently to explain the subsequent action of the Register in issuing to Phillips a certificate of purchase of these lands, for presumably he treated the former certificate as annulled by the foreclosure proceedings.

This Phillips certificate was issued in 1886 upon the payment of the initial amounts required by the statute. Thereafter there was passed the act of 1889 hereinbefore quoted at length. Irrespective of the foreclosure proceedings or the question of laches and the statute of limitation, the State Supreme Court held that through the failure of the holder of the Brackett certificate to comply with the requirements of this act the plaintiff in error had no rights to the lands in question. He, however, complains that this act impaired the obligation of the contract of purchase, and that the State Supreme Court having upheld the validity of the act must of necessity have assumed its validity in order to base thereon its decision upon the questions of laches and of the statute of limitations. That the State Supreme Court sustained the act is true, and that its position in that respect is sound we shall hereafter contend in this brief in presenting that point, but that it assumed the

validity of the act in passing upon the questions of laches and statute of limitations we deny, and we apprehend that plaintiff in error has completely mistaken the position of the court and effect of that statute in its bearing upon those questions. Regardless of its validity as to the matter of impairment of contracts or other constitutional provisions, it was an act regularly passed and therefore a legislative declaration of position to be thereafter assumed by the State with reference to contracts of the character represented by the Brackett certificate. Whether the State might legally thereafter by reason of such act maintain the position therein declared was not material—it was thereby asserting an intention to assume thereafter a position which might be subversive of any rights held by a certificate holder who was in default in the payment of interest. The enactment of such statute was notice to all such certificate holders of the position to be thereafter assumed by the State, and whether such position might thereafter be successfully maintained or not it was an act which had the effect of starting the statute of limitations to running, at least at the expiration of the six months' period therein given to such certificate holders to pay up their arrears of interest or have their rights forfeited.

Plaintiff in error in addressing himself to the questions of laches and the statute of limitations confuses the right to withdraw from a contract with the assertion of such right and repudiation of

obligations thereunder. He assumes that if the right did not exist the assertion of such right could have no effect. But he overlooks the meaning of laches and the statute of limitations. The assertion of a right may be wrongful, still it may be the means of requiring the one against whom the right is asserted to act within a period of time thereafter or be barred from establishing the wrongfulness of the asserted right.

It is admitted by plaintiff in error that the obligations of a State when selling its lands are those of a private vendor—then its rights must be at least equal to those of a private vendor. Had a private vendor, on default of the vendee, given the latter notice that he would no longer abide by the contract unless the arrearage was paid, certainly, regardless of the right of the vendor to take such position, the right of the vendee to subsequently enforce performance by the vendor would be barred at the end of the statutory period following the time when such arrearages should have been paid as required in the notice of the vendor. And in such suit the plea of laches might likewise be available to the vendor if, as in this case, he had acted upon the continued default of the vendee and apparent disregard of the notice given and had assumed new, or continued old, obligations with another person with respect to the same lands. This is the position of the State in the present case and it was in view of this that the State Supreme Court, regardless of the validity of the act of

1889 in so far as it might affect any rights of the certificate holder, said:

> "For more than thirty-eight years no attention was paid to the obligation to pay interest in advance each year to the State. Meanwhile the State had at least attempted foreclosure proceedings and in 1889 had constructively notified all persons intereste1 in the matter of the intention to disregard any asserted rights to the land arising unde. the Brackett purchase unless the arrears should be paid, yet nothing was done by the holder of the certificate which had been issued to Brackett until after the completion of the sale to Phillips. Under these circumstances the statute of limitations, which was pleaded clearly applies. (*Barnes v. Glide*, 117 Cal. 7, 59 Am. St. Rep. 153, 48 Pac. 804.) While this is in form an action at law to compel the performance by an officer of the State of a duty imposed upon him by statute it is in effect an action to require specific performance on the part of the State and the laches of the petitioner may be shown to defeat his purpose. We are convinced that the petitioner slept upon his rights and should not now be heard after the lapse of many years, to assert his claim. (*Kleinclaus v. Dutard*, 147 Cal. 246, 81 Pac. 518; *Hynes v. M. J. & M. M. Consolidated*, 168 Cal. 654, 144 Pac. 144; *Emerson v. Kennedy etc. Co.*, 169 Cal. 718, 147 Pac. 939.)"

We submit that the position of the State Supreme Court is sound upon these questions of laches and the statute of limitations; that there is no question presented by the case upon which this Court should assume jurisdiction and that the writ of error should be dismissed.

III.

THE ACT OF 1889 DID NOT VIOLATE THE FEDERAL CONSTITUTION.

Plaintiff in error contends that the act of 1889 was invalid in that it was an attempt on the part of the State to impair the obligation of the contract held by the holder of the Brackett certificate of purchase.

This contention we believe is fully refuted in the opinion of the State Supreme Court, but because plaintiff in error attempts to distinguish between a remedy for enforcement of contractual obligations which admittedly the State may alter, and a right of redemption which the State may not take away, we desire to show that in the present case there was in the act of 1889, but the assertion by the State of an additional remedy, and furthermore that in such additional remedy not only was the right of redemption not taken away, but it was enlarged in favor of the certificate holder against the State.

It is to be borne in mind that under the act of 1868, to which the purchaser subscribed, no actual notice to him, by personal service, was required in the foreclosure proceedings. Service of the summons might be made by publication.

There was no requirement in the statute that the suit should be against the one to whom the certificate had been issued, but against the holder whoever he might be. If the holder was not the

purchaser, and it was contemplated that he might not be, for he might, under the statute, assign his interest and the certificate, a designation of the original purchaser in the summons could convey no more notice than would the designation of the number of the certificate and the description of the land.

If it be argued that jurisdiction over the purchaser or over the holder could not be obtained by publication of a summons directed to a fictitious defendant, the answer is that if the State was compelled to resort to this foreclosure procedure at all it was because it was part of the contract entered into between the State and the purchaser. But if it was part of the contract then the purchaser has subscribed to the procedure specified in the statute and can not complain if that procedure has been followed, nor can he require that any other or further procedure be had by the State.

The foreclosure proceedings, even if they were had, would but result in a judicial determination that the purchaser had no further claims upon the State or upon the land in question. The decree did not create the default or the forfeiture—it but declared the same. That the statute regarded the failure on the part of purchaser to pay, and not the decree, as the act which created the forfeiture is evidenced from the provision in section 66 that upon redeeming he was to be "restored to his rights in the land, the same *as if no neglect or forfeiture had been made*". It does not follow,

therefore, that the fact of such forfeiture could not be shown otherwise than by a judicial determination in such foreclosure proceedings.

It is contended by respondent that the provision in section 66 of the act of 1868 giving the purchaser twenty days after the entry of the decree of foreclosure in which to redeem and be restored to his rights precludes the State from taking any other action or from resorting to any right or remedy which it would otherwise have had in the absence of that provision. In other words, it is argued that the method prescribed in the statute was exclusive. But in what way was it exclusive? It was not made expressly a part of the contract, and therefore within the doctrine stated in *Wilson v. Standifer,* 184 U. S. 399, and *Waggoner v. Flack,* 188 U. S. 595, the State could prescribe another method, unless there was in the former method a right reserved to the purchaser which became part of his contract and of which the later act could not deprive him. What was there then in the former procedure which was so far of benefit to him as to confer upon him a right which the State could not by a later act alter or take away? If he had any such right and was still protected in that right under the later act it is no concern of his that the State has adopted another procedure which affects its rights alone.

Had the act of 1868 provided merely for a judicial determination of forfeiture, or a judicial foreclosure without making any provision for

redemption, there would then have been no distinction between that act and the Texas act considered in *Wilson v. Standefer, supra.* In such case the subsequent act of 1889 declaring a forfeiture would have been treated as was the subsequent Texas statute, and the purchaser being shut up to the one defense that he was not in default could at any time show that the act of 1889 did not apply to him. But the act of 1868 contained the additional provision that the purchaser should have the right to redeem at any time within twenty days after the entry of such judgment of foreclosure. This, it is claimed by plaintiff in error, conferred upon the purchaser a right of which he could not be deprived. But what was that right? Assuming that it was the right to redeem after the judgment of forfeiture, which was implied if not expressed in the judgment of foreclosure, and assuming he still had the right to redeem after the determination of forfeiture which under the act of 1889 was effected six months after the passage of that act—at most he had but the right to redeem within twenty days after the expiration of such six months. It follows from *Wilson v. Standefer* and *Waggoner v. Flack* that the purchaser is not entitled to insist that the method of determining the forfeiture shall remain the same as it was at the time he contracted, that is to say, if he is in default, he can not object that the State has determined a forfeiture in a manner other than by complying with the judicial

procedure authorized by the statute at the time of his purchase. At most he can claim only that the rights which accrued to him upon such forfeiture shall not be different under the later procedure from what they were at the time he purchased. What, then, were those rights? Merely to come in and pay within twenty days after such forfeiture the amount for which he was in default and be restored to his rights. Assuming that of this right he could not be deprived, he was then privileged to come in within twenty days after the six months specified in the act of 1889, pay up the amount of his default and be restored. Even this he did not do, but allowed not only that twenty days to expire but twenty-one years more before he attempted to do anything.

The provisions of section 66, with respect to the entering of the judgment of foreclosure and the filing of certified copies thereof in the office of register and of the county recorder, and the running of the twenty-day period from the entry of such judgment, are all but matters of procedure as to which the purchaser could not insist that they remain the same. Any other procedure might be instituted, and provided he was allowed the same period of time after acts thereunder of which he may be deemed to have had as much notice as he had of the entry of such judgment or of the filing of such certified copies, he can not be heard to complain. No actual notice of the entry of such decree or the filing of such

copies was required to be given him. The notice was but a constructive notice at most. He was charged with the same degree of constructive notice by the act of 1889, and the period left open to him to act in the latter case after the passage of the act was certainly greater than under the former procedure after the entry of the judgment. It can not, therefore, be maintained, even assuming that he had a right to redeem after the act of 1889, that the obligation of the contract has been impaired.

When a vendee is in default in his payment, either of principal or interest, the vendor is not compelled to resort to the remedies afforded him by statute nor can he be compelled to bring an action to rescind or an action to foreclose the interests of the vendee. He may stand upon his contract and assert that as the vendee persists in breaching his obligation, he, the vendor, will no longer abide by the obligations upon his part.

> "Upon the other hand, after the vendee's breach of the covenant to pay, what are the vendor's rights? 1. To stand upon the terms of his contract and sue for its breach under section 3307 of the Civil Code; 2. Still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee; so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages;
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> One thing more he may do, but this is rather incidental to the fact that he has made the

> contract than a right growing out of it. It has heretofore been said that in certain cases equity will relieve the vendee from the effect of a breach of his covenant to pay upon a day certain. When such relief is granted, it is only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance, excusing the breach. Now, as the vendee in default may maintain such an action, so may the vendor call the defaulting vendee into a court of equity and compel him to show why all his rights under the contract should not be held to be at an end. The vendor when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title. In some forums this is designated an action for rescission. With us it is commonly called an action to foreclose the vendee's rights."
>
> *Glock v. Howard and Wilson Col. Co.,* 123 Cal. 1, 10.

There has in such case been a partial failure of consideration which justifies the vendor in withdrawing from the bargain, and treating the rights of the vendee in the land as at an end.

Smith v. Blandin, 133 Cal. 441, 444.

Plaintiff in error assumes throughout his brief that the State had accepted his purchase money in 1911, whereas the fact is that though such money may have been paid to the County Treasurer for the benefit of the State neither that officer nor any other had authority to bind the State in the face of the legislative declaration in the act of 1889. And likewise his contention that foreclosure pro-

ceedings might have been brought by the State after the act of 1889 may be disposed of by noting that the effect of this act was to declare the rights of the purchaser forfeited after the six months had elapsed, and being forfeited they could not be revived, in the absence of a legislative declaration, by any officer commencing a foreclosure proceeding upon the same lands, nor could the purchaser be thereby given a right of redemption, after that six months' period had elapsed, beyond what he was then entitled to under the law, and this right as we have seen was, at the most, limited to twenty days after the declaration of forfeiture. Whether such declaration was by a judgment or by the operation of the statute, it was conclusive, as to the Brackett certificate, at least at the end of six months and twenty days after the passage of the act of 1889. We believe however that the certificate holder would be accorded all he was entitled to if it be held that the ultimate point of redemption was at the end of the six months.

IV.

THERE WAS NO WANT OF DUE PROCESS IN THE ACT OF 1889 SO FAR AS PLAINTIFF IN ERROR WAS AFFECTED THEREBY.

Plaintiff in error complains of the act of 1889 also because it recognized that two certificates of purchase might be outstanding for the same lands. How the holder of the earlier certificate could be

injuriously affected by that statute is not shown. The act did not apply to him unless he was in default and if he paid his arrears it was the holder of the later certificate who might be in a position to suffer. His argument, therefore, to the effect that the act divested property from one person and conferred it upon another, is but a showing that he stood to be benefited by that act. Furthermore, it carries us back to our first discussion as to its validtiy and to the power of the Legislature to assume such position for the State as a vendor of its lands.

In conclusion, if this writ of error is not dismissed for want of jurisdiction, we respectfully submit that upon the merits of the case the judgment of the State Supreme Court should be affirmed.

Dated, San Francisco,
March 25, 1918.

Respectfully submitted,

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